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FOREWORD TO THE INAUGURAL ISSUE

The Journal of Commonwealth Criminal Law is published by the Association of Commonwealth Criminal Lawyers, which was established in October, 2010. The Commonwealth of Nations is the world's oldest political association of sovereign states, comprising 54 countries, with about two billion inhabitants, representing nearly one-third of the world's population. It stretches from Australia to Zambia, from India to St Lucia, and represents a wide range of cultures, beliefs and nationalities. Its origins are to be found in a shared history, similar judicial and parliamentary systems, and the common use of the English language. Its core values, as reaffirmed by the Commonwealth Heads of Government in Trinidad and Tobago in November, 2009, are international peace and security, democracy, human rights, tolerance, respect and understanding, the separation of powers, the rule of law, freedom of expression, development, gender equality, access to health and education, good governance and civil society.

The legal systems of the great majority of Commonwealth countries are founded in the common law. In the field of criminal practice, this means that the procedures adopted are informed by certain key common law precepts, such as the presumption of innocence, the adversarial process and the privilege against self-incrimination. The substantive criminal law of almost all Commonwealth countries may now largely be found in the local legislation, but some is still based on the common law. The legislation in the majority of Commonwealth countries has its roots in one or other of three codes drafted in the nineteenth century. The first two, those of Thomas Babington Macaulay and James Fitzjames Stephen, started out as attempts to codify the law of England and Wales. The third, that of Samuel Griffith was never intended as a code for England and Wales, but it drew on English law as well as other sources, such as the *Italian Penal Code*. Whilst none of these codes was ever adopted in England and Wales, one or other was adopted throughout the Commonwealth. Thus, today, the Macauley Code remains the basis of the criminal law in India, Pakistan, Sri Lanka, Bangladesh, Malaysia, Singapore and elsewhere; the Griffith Code provides the substantive criminal law of the states of Queensland and Western Australia as well as of countries as far away as Nigeria and Jamaica; and the Stephen Code found favour in Canada and New Zealand among other countries. Both the procedural and substantive criminal law of almost all the nations of the Commonwealth have, therefore, common roots and principles and share many fundamental concepts.

The Association of Commonwealth Criminal Lawyers exists to promote, throughout the Commonwealth: (i) traditional principles of common law criminal justice, namely the rule of law, an independent judiciary and legal profession, the right to a fair trial by an independent and impartial tribunal, in public and within a reasonable time, the adversarial process, humane and consistent sentencing practice reflective of the gravity of the offence, and well-drafted criminal legislation; (ii) the protection of fundamental rights and freedoms through the common law; (iii) awareness of invasive, oppressive, or overly restrictive laws, and of human rights abuses, in particular those perpetrated through or in spite of the criminal law; and (iv) education in the law and in common law principles.

The Journal of Commonwealth Criminal Law is one of the key means by which the Association intends to promote its objects. For far too long, there has been no publication dealing specifically and exclusively with developments in common law criminal justice. The suspicion must be that this had something to do with a sense of superiority among the legal profession and the judiciary in the United Kingdom, quite possibly associated with the fact that, at one time or another, the ultimate court of appeal for virtually all countries now members of the Commonwealth was the Judicial Committee of the Privy Council in London, whose personnel were almost identical to the Appellate Committee of the House of Lords. For many years, it would be standard for Commonwealth courts, even of countries such as Canada and Australia, to consult English authority, and yet it would be almost unheard of for the courts of England and Wales to consult the authorities of the Commonwealth. Things have changed, however, and in no small measure due to the attitude of Lord Bingham, who, during his tenure as senior Law Lord in the House of Lords, made it clear that he expected counsel to be in a position to inform the court as to how the matter in issue in the particular appeal was dealt with in the Commonwealth. What was once a one-way street now has traffic moving in both directions. This journal is intended to further this movement by encouraging dialogue between all the countries of the Commonwealth with no precedence being accorded to the jurisprudence of any one country, it now being beyond argument that the quality of the output of several of the senior courts of the Commonwealth is at least the equal of that of the Supreme Court of the United Kingdom.

As the contents of the inaugural issue amply demonstrate, there is an enormous range of topics which can benefit from comparative study; and this barely scratches the surface. The ambit of the journal's coverage extends from the investigation of crime, through preparation for trial, to trial itself, including the full range of evidence issues and mode of trial issues, the substantive criminal law,

sentencing, appeals and the investigation and treatment of possible miscarriages of justice. The inaugural issue is fortunate to benefit from contributions from both the President and the Vice-president of the Association of Commonwealth Criminal Lawyers, two of the most distinguished lawyers in the common law world in the last 50 years. They have set a standard that it will be difficult to emulate, but it is the commitment of the editorial board to be uncompromising in its promotion of the values of the Association, and in its pursuit of excellence in practice.

J.R.
May 15, 2011

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PUBLIC DUTIES AND CRIMINAL OMISSIONS: SOME UNRESOLVED QUESTIONS

ANDREW ASHWORTH Q.C.*

ABSTRACT

This article explores four unresolved questions on offences of omission in common law jurisdictions. How are the categories of duty-situations usually determined? What forms of duty-situation have Commonwealth legislatures found it necessary to add, and why? Should a “duty of easy rescue” be recognized? Where a duty is imposed, what conduct should be demanded of the citizen? These questions are discussed in the light of Commonwealth laws and of rule-of-law principles.

Criminal law textbooks across the many Commonwealth jurisdictions recognise that liability for omissions in criminal law is exceptional. Most offences penalize the doing of acts, and most of the language of the textbooks and of the laws themselves proceeds on the basis of a criminal act. On the other hand, there are some offences of omission in all systems of criminal law, and they depend on the recognition of a public duty to act in certain situations. The purpose of this article is to explore four of the many unresolved questions relating to liability for criminal omissions in common law systems. What are the limits to recognition of duty situations at common law? What forms of duty situation have legislatures found it necessary to add to the common law, and for what reasons? To what extent have the arguments in favour of a duty of “easy rescue” been welcomed in Commonwealth jurisdictions? And, what conduct is required in cases where a duty to act is imposed?

There are several other unresolved questions in relation to liability for criminal omissions – for example, what fault requirement is appropriate? how does the doctrine of causation apply? what defences should be open to people who find themselves in a duty situation? – but those must wait for another day. For the present, our examination of the four chosen questions must be preceded by a short history of omissions liability at common law, and an explanation of the reasons why legislative reform has not been undertaken in England and Wales.

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I. A SHORT HISTORY OF OMISSIONS LIABILITY AT COMMON LAW

The common law approach to offences of omission is that they should not be general, and that they should give rise to criminal liability only if there is a recognized duty to act in that situation. Thus an omission should lead to liability for homicide, for example, only where a distinct duty to act was neglected. This was explained and defended in the nineteenth century in these terms:

“It is, indeed, most highly desirable that men should not merely abstain from doing harm to their neighbours, but should render active services to their neighbours. In general, however, the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good. It is evident that to attempt to punish men by law for not rendering to others all the service which it is their duty to render to others would be preposterous. We must grant immunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as particularly fit objects of penal legislation.”¹

This was Lord Macaulay’s summary of the spirit and rationale of the common law stance on omissions in the mid-nineteenth century, when considering the drafting of a criminal code for India. It suggests that positive duties to act are matters for morality, and that only when it is possible to point to a strong and specific responsibility should the criminal law be invoked. Behind the adjective “preposterous” lay a belief that it was not appropriate for the criminal law to intervene except in strong cases, lesser cases being left to conscience and social expectation.

Macaulay was evidently troubled also by the difficulty of determining the boundaries of any general duty of “rescue” or beneficence that might be imposed. His conclusion was that the criminal law could not be thus extended –

“... without disturbing the whole order of society. It is true that the man who, having an abundance of wealth, suffers a fellow creature to die of hunger at his feet is a bad man, a worse man, probably, than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such a man legally punishable, we can draw

¹ Macaulay, *Speeches and Poems with Report and Notes on the Indian Penal Code* (New York, Hurd & Houghton 1867), vol. 2, 408.

the line. If the rich man who refuses to save a beggar's life at the cost of a little copper is a murderer, is the poor man just one degree above beggary also to be a murderer if he omits to invite the beggar to partake his hard-earned rice?"²

Although this is presented as an intractable problem of line-drawing, it is one that appears to have caused few problems in those systems of criminal law that contain a positive duty to assist citizens in peril. Macaulay's particular concern here relates to convicting such a person of murder, *i.e.* of an offence of commission by omission, but that loads the dice somewhat. He does not discuss the wider (and lesser) alternative of creating a general offence of failure to assist a person in peril, the so-called "duty of easy rescue" that is a feature of many European legal systems. We will return later to this distinction between the two approaches to criminalization.³

It now remains to complete the set of nineteenth-century rationalisations by quoting Sir James Fitzjames Stephen's exposition of the common law:

"A number of people who stand around a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the pond, are no doubt shameful cowards, but they can hardly be said to have killed the child."⁴

This particular passage relies on "ordinary language" reasoning – by arguing that the adults do not "kill" the child, as a sufficient reason for the conclusion – and this is not the most stable foundation for an argument about the proper limits of the criminal law. But the context is one in which Stephen appears to think that no further justification is called for, so obvious is it that liability for homicide by omission should only be imposed where the law has recognized a specific duty to act. This approach influenced his draft *Criminal Code* of 1878, and also the Griffith code for Queensland of 1901 and its progeny.⁵

The question of liability for criminal omissions was then not debated in official circles in England and Wales until the 1980s, when work began on a criminal code. The Law Commission's report, which contained a draft criminal code (never enacted), repeated the traditional common law view:

"Criminal liability for failing to act is exceptional. Parliament sometimes makes it an offence to fail to do something (as

² *ibid.*, 407.

³ See part 4, *post*.

⁴ Stephen, *A History of the Criminal Law of England* (London 1885), vol. 3, 10.

⁵ For general discussion of the evolution of Commonwealth codes, see R.S. O'Regan, *New Essays on the Australian Criminal Codes* (Sydney 1988), Ch. VIII.

with wilful neglect of a child, the failure of a motorist to exchange particulars after an accident, or the failure of a company to make an annual return). Most other instances of liability for omissions depend upon judicial construction of statutory language as referring to omissions as well as to acts, or upon common law (that is, judicial) recognition, in limited and rather ill-defined circumstances, of a duty to prevent a particular kind of harm (notably certain harms to the person) or to prevent the commission of an offence.”⁶

The problem that confronted the Law Commission was that it was and is uncertain which offences can be committed by omission and which not: this has always been regarded as a matter for judicial interpretation. The Law Commission did not feel able to make a list of all the offences to which a general provision on omissions liability could be applied. So it decided to do nothing. It recommended that a criminal code for England and Wales should not contain a provision on omissions:⁷ questions of liability for omissions “must remain a matter of construction and, so far as duties to act are concerned, of common law.”⁸ Its subsequent report on the law of manslaughter was much more critical of the uncertain state of the law relating to omissions, but concluded nevertheless that the common law was best left undisturbed pending a thorough and specific re-examination of omissions liability.⁹ A decade and a half later, no such review has taken place.

As a result, (i) whether a particular offence under English law can be committed by omission is a question of interpretation for the judiciary; and (ii) whether, in a particular situation, there is a positive duty to act is a question for the judiciary, developing the common law; and (iii) there has been no examination of the arguments for and against a general duty of easy rescue on what we may call “the European model.” The draft criminal code of 1989 has never been presented to Parliament, but neither has there been any general discussion of omissions liability since that time.

From this brief history it appears that there is no agreed doctrinal foundation for this aspect of the common law. Lord Macaulay relied

⁶ Law Commission, *A Criminal Code for England and Wales* (Law Commission No. 177, 1989) vol. 2, 186-187; this had also been the stance taken by the Criminal Law Revision Committee, 14th Report, *Offences Against the Person* (Cmnd 7844, 1980), paras 252-256.

⁷ This recommendation departed from the proposals of the team of academic lawyers who had drafted the first version of the criminal code a few years earlier, clause 20(2) of which gives a list of duty-situations: Law Commission, *Codification of the Criminal Law: a Report to the Law Commission* (Law Commission No. 143, 1985).

⁸ Law Commission (n.6), 187.

⁹ Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Commission No. 237, 1996), para. 5.44.

on what he regarded as an appropriate division of functions between the criminal law and morality, and also on practical problems of line-drawing. Stephen relied on ordinary language, although he probably accepted Macaulay's first reason too. Underlying the common law position seems to be an argument based on the values of autonomy and liberty.¹⁰ In principle, respecting the autonomy of each citizen means maximising their opportunities to live life as they wish, and to achieve their own goals. Criminal offences which prohibit certain conduct narrow down these options, and reduce the range of opportunities by ruling out murder, fraud, damage, theft and other ways of unfairly gaining preference for one's own goals. But those criminal offences amount to only a small restriction on liberty in a civilized society, since most people will rarely be tempted thus to infringe the rights of others. Criminal liability for omissions, on the other hand, generates positive duties to act, requiring the citizen to give priority to helping another person who is in peril rather than pursuing his or her own goals. The more of these offences of omission that are created, the greater the incursion into individual freedom of action, an incursion that is further increased if the ambit of the duties and offences of omission is plagued by uncertainty (a point appreciated by the English Law Commission).¹¹ Thus, in order to maximise respect for individual autonomy and liberty, criminal liability for omissions should be confined to strong and clear situations.

Even if some such course of reasoning would justify the common law's position on criminal omissions, it is incomplete. Nothing has been said about the kinds of situation in which omissions liability would, exceptionally, be appropriate – what characteristics such situations must have, and what justifications support the making of an exception. As soon as those questions are confronted, it is obvious that there is a rival set of normative propositions based on social co-operation and community rather than on individual autonomy and liberty, where responsibility for others may be founded on several possible personal ties, and where values such as the right to life may be recognized as more powerful than the right to liberty in some circumstances. These propositions will be discussed further as the article develops. The important point at this stage is that the position on criminal omissions taken by the common law or any other system can be placed at various points along a spectrum running from extreme individualism (where no positive duties are

¹⁰ See further A. Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 L.Q.R. 424, pp. 424-430; A.P. Simester, 'Why Omissions are Special', (1995) 1 Legal Theory 311.

¹¹ Law Commission (n.9), para. 3.16.

recognized) to what might be termed full communitarianism (where personal liberty is always subordinated to social responsibilities). If we say, crudely and provisionally, that the common law is closer to extreme individualism, that still leaves considerable scope for us to define its precise position, to look at variations among Commonwealth countries, and to assess the reasons for the differences.

II. DUTY SITUATIONS RECOGNISED AT COMMON LAW

The first question to be determined is whether a particular offence can be committed by omission, and this is still regarded as a matter for the judiciary. If the crime is a common law offence (like murder and manslaughter, in English law), the court must apply or develop the common law.¹² If the crime is a statutory offence, the court must decide whether the offence is capable of being committed by omission or not. The English Law Commission was correct in stating that these decisions have been taken on an offence-by-offence basis, without any appearance of an overall strategy. One might have thought that the task of a Law Commission should have been to discuss such a strategy and to create one or more presumptions in order to guide judicial interpretation. But, as we have seen, this did not happen.

Once a court has decided that a particular offence can be committed by omission, it must next decide whether there is a “duty-situation” that applies to the facts of the case, thereby recognizing that the person has an obligation to take positive action. The list of duty-situations has been expanded by the courts over the years, and five categories may be described in broad terms:¹³

- (i) Relationship Duties: a parent has a duty towards her or his child, and one spouse towards the other, but there is great uncertainty about the obligations arising from other family relationships and from membership of the same household.
- (ii) Duties arising from Assumption of Responsibility: a person has a duty if he or she makes a contract or a less formal agreement to supply another person with food or care.

¹² Subject, of course, to the principle of legality (see text accompanying n.29 below). For a recent example, see *R v. Clark* [2003] EWCA Crim 991, [2003] R.T.R. 411, where the Court of Appeal declined to extend the common law offence of perverting the course of justice to cases of omission.

¹³ For the relevant English law, see A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th edn, Hart, 2010), 71; and David Ormerod, *Smith and Hogan Criminal Law* (12th edn, Oxford University Press, 2008), 61; for a general discussion of Anglo-American and German categories of duty, see G.P. Fletcher, *Rethinking Criminal Law* (Boston, Little Brown 1978), 611-625.

There is uncertainty about the circumstances in which such a duty can be implied when a person simply helps another person on one or more occasions.

- (iii) Duties arising from Ownership or Control of Property: the owner of a house or car has been held to have a duty to stop another person committing an offence in that house or car when the owner is present, or at least a duty to tell the person to stop.
- (iv) Duties arising from Prior Dangerous Act: a person who unintentionally causes a dangerous situation has a duty to try to prevent that situation from getting worse or from causing harm or further harm.¹⁴
- (v) Duties arising from Control of a Dangerous Article: a person who knowingly has control of a dangerous article has a duty to ensure that it is dealt with safely.¹⁵

Each of these categories has a penumbra of uncertainty, because the judges have developed the law in the course of deciding individual cases. Some jurisdictions have placed some or all of the common law categories in legislation,¹⁶ whereas others continue with the case-law. It would be possible now to discuss many of the judicial decisions that have shaped the law, but it will be sufficient to take just three examples of the difficulties that remain.

One of the best-known cases is *R. v. Stone and Dobinson*.¹⁷ Stone's sister came to stay in the house occupied by Stone and Dobinson. She suffered from anorexia nervosa, she ate very little and she became weaker. Stone and Dobinson made efforts to contact her doctor, without success; Dobinson offered her food from time to time, and Dobinson and a neighbour washed the sister on one occasion (by which stage she was lying in her own excrement); one month later she was found dead. Stone and Dobinson were charged with manslaughter, on the basis that they had an obligation to care for her and had caused her death by gross negligence. The Court of

¹⁴ To the extent that the situation was caused culpably, the duty is surely stronger: see L. Alexander, 'Criminal Liability for Omissions: an Inventory of Issues' in S. Shute and A.P. Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press 2002), 129.

¹⁵ This fifth category is not included in the English textbooks, but finds a place in some Commonwealth jurisdictions: see e.g. *Criminal Code Act* 1899 (Queensland) s.289; *Criminal Code Act* 1924 (Tasmania) s.150; and *Crimes Act* 1961 (New Zealand), s.156, all based on the draft criminal code of 1878; for South Africa see J. Burchell, *Principles of Criminal Law* (3rd edn, Lansdowne 2005) 190-191.

¹⁶ E.g. *Criminal Code Act* 1995 (Queensland), Pt 7. It is noticeable that the categories set out in the German *Criminal Code* resemble those at common law quite closely: see the discussion by M. Bohlander, *Principles of German Criminal Law* (Oxford, Hart 2009), 40-45.

¹⁷ [1977] Q.B. 354 (Court of Appeal).

Appeal gave three reasons for holding that there was a duty in this case:

“she [the sister] was a blood relation of the appellant Stone; she was occupying a room in his house; the appellant Dobinson had undertaken the duty of trying to wash her, and of taking such food to her as she required.”

Each of these reasons is contestable. The first suggests that any blood relationship is a sufficient reason for finding an obligation, whereas there are other decisions that cast doubt on this.¹⁸ Stronger arguments are surely needed in order to support a duty towards an adult sister. The second reason is even wider, in that it suggests that if anyone occupies a room in one’s house, that creates an obligation of care. Further exploration of the circumstances of the occupation, and its length, are surely required before this becomes a robust reason.¹⁹ The third reason is formulated in such a way as to produce the desired answer: when Lane L.J. stated (wrongly) that Dobinson has “undertaken the *duty* of trying to wash” the sister, what he meant was that on one occasion she had done so. She did not do so for reasons of duty. The court appears to be saying that, once a person has tried to assist another, that creates an obligation to continue helping that person – a very different doctrine, which has the corollary that a person who shows no kindness at all bears no duty. None of these reasons is convincing, and the court’s arguments are so unsatisfactory that even a cumulation of these three reasons fails to provide a justification.

Similar issues arose in the New South Wales case of *R v. Taktak*.²⁰ T, a drug addict, arranged for a young woman who was also an addict to attend a party at a friend’s house and to act as a prostitute. In the early hours of the morning the friend contacted him and asked him to collect the young woman from the party. When he did, he found that she was unconscious through taking drugs. T took her to his home and made various efforts to revive her. In the morning he called for

¹⁸ *E.g. R. v. Smith* (1826) 2 C. & P. 449 (no duty to maintain adult brother who was mentally handicapped) and *R. v. Sheppard* (1862) L. & C. 147 (no duty towards daughter of 18, even though age of majority was then 21); *R v. Chattaway* (1922) 17 Cr.App.R. 7 (Court of Criminal Appeal) (duty towards daughter aged 25); see generally P.R. Glazebrook, ‘Criminal Omissions: the Duty Requirement in Offences against the Person’ (1960) 76 L.Q.R. 386.

¹⁹ Contrast the decisions in *R v. Khan and Khan* [1998] EWCA Crim 971, [1998] Crim. L.R. 830 (girl supplied with heroin subsequently collapsed in K’s flat, trial judge had failed to consider whether this gave rise to duty to summon medical assistance, question left open), and *People v. Beardsley* (1907) 113 N.W. 1128 (American decision suggesting no duty where weekend guest took an overdose, and defendant simply moved her to a neighbouring flat).

²⁰ (1988) 34 A. Crim. R. 334.

medical assistance, but she had died. The Court of Appeal of New South Wales held that a duty of care had arisen because T assumed the care of a helpless person, with the consequence that he had “secluded” the person and thereby removed the possibility of others helping her. In the event the court quashed T’s conviction, being unsure that T’s delay in calling for medical assistance amounted to a gross breach of his duty of care. The importance of this decision is that it gives a plausible reason for holding that a person who voluntarily takes on the care of another acquires a duty by doing so: the notion of “seclusion” – removing the helpless person and thus rendering it far less likely that anyone else will give assistance – may be applied in many such cases.

Whereas those two cases contained elements of categories (i), (ii) and (iii) above, the case of *R. v. Evans*²¹ was held to fall into category (iv) only. Evans had supplied her half-sister with heroin. Her half-sister took the heroin and then became ill. Evans tried to care for her during the evening and overnight, but in the morning the half-sister was dead from heroin poisoning. The trial judge directed the jury that the blood relationship of half-sister was not sufficient to create a duty, and that the help Evans had tried to give was not sufficient for an assumption of responsibility (category (ii)). The Court of Appeal upheld the conviction of Evans for manslaughter on the basis of category (iv), that she had created a dangerous situation by supplying the heroin to her half-sister and, when she became aware of the adverse effects on her half-sister’s health, had not taken effective steps to remedy the situation. This can be regarded as an unprincipled extension of category (iv), because the half-sister’s taking of the heroin was an intervening voluntary act which, on normal principles, would break the causal chain between the supply of the drug by Evans and the later illness of her half-sister.

Not only did the Court of Appeal extend category (iv), but they created further doubt about the significance of the judgment in *Stone and Dobinson* for the scope of category (ii). Here the judge directed the jury that Evans had not assumed responsibility by her efforts to care for her half-sister during the evening and night. Is that inconsistent with the reasoning in *Stone and Dobinson*? The Court of Appeal here sought a middle ground:

“We would merely record that the judge’s direction that a duty to act did not arise from a voluntary assumption of [responsibility] by the appellant may have been appropriate in this case, but it would not be of universal application where,

²¹ [2009] EWCA Crim 650, [2009] 1 W.L.R. 1999, on which see Glenys Williams, ‘Gross Negligence Manslaughter and Duty of Care in “Drugs” Cases’ [2009] Crim. L.R. 631.

for example, a voluntary assumption of [responsibility] by the defendant had led the victim, or others, to become dependent on him to act.”

The final words of this sentence seem to echo the “seclusion” principle in *Taktač*, and that principle is close to the notion of reliance that seems to underlie the duty-situations in category (ii). The reliance here is not so much actual reliance as reasonable reliance: given the situation, and what the defendant had done, was it reasonable for others (including the person in peril) to rely on the defendant for assistance? Much depends on the facts; but, where present, this element of reliance creates a firmer moral foundation for imposing a duty on the basis of voluntary assistance. Applied to the facts of *Stone and Dobinson*, it would probably not have indicated an assumption of responsibility by Dobinson, since the act of washing Stone’s sister cannot be said to have “secluded” her, as she was already in the house. However, the “seclusion” rationale might apply to Stone’s act of allowing his sister to stay at the house: by not turning her away, he accepted her into an environment where she was unlikely to be helped by others.

The discussions in and around the three appellate decisions demonstrate that there is deep uncertainty in both the principles to be applied and the effect of applying them. Much more could be written about these and other cases, and about the various common law categories. It is sufficient to state here that the foundation for (i) the relationship duty of parent to child is clear, and might apply no less to parent and mentally disordered adult; but that there is no clear principle relating to responsibilities for adult relatives, particularly for elderly parents.²² One approach is to delineate the scope of the duty by referring to members of the same household,²³ although the term “household” calls out for further definition.²⁴ As for (ii) duties arising from assumption of responsibility, there needs to be scrutiny of the arguments for regarding contracts and other agreements as sufficient bases for duty, unless there is an explicit undertaking to protect another’s safety; and there remains deep uncertainty about the duties of someone who voluntarily helps another. Should it always be sufficient if someone allows another to stay in a house or apartment? When should it raise a duty if someone tries to help another? The seclusion principle has been proposed, but it is not yet

²² See Alexander (n.14), 139-140, and F. McAuley and J.P. McCutcheon, *Criminal Liability* (Dublin, Round Hall Sweet & Maxwell 2000), 192-193.

²³ See the proposals of the English criminal code team, Law Commission (n.7), cl.20(2)(a)(ii), and of the Model Criminal Code Officers’ Committee, *Non-Fatal Offences against the Person* (Canberra 1998), para. 5.1.7.

²⁴ A form of definition has been enacted in England: see *Domestic Violence, Crime and Victims Act* 2004, s.5(4), discussed *post*, text at n.50.

widely accepted and it is contingent in its application to particular facts. Little has been said here about (iii), but it is controversial whether the mere presence of an owner or controller of property should be sufficient to ground a duty to prevent the commission of an offence.²⁵ As for (iv) and (v), those categories depend on the causal responsibility of the defendant for creating the situation, even unwittingly. Authorship and presence are thought sufficient, in combination, to justify the imposition of a duty to take steps to remove the danger.

The ruminations in the previous paragraph point to a significant defect in the common law approach to omissions. According to the principle of legality or the “rule of law”, legal norms, and especially those of the criminal law, must be clear, stable, and not retrospective in their operation. The law’s primary function is to guide people’s conduct, and in this context Lon Fuller, in his catalogue of “eight ways to fail to make a law”,²⁶ emphasised the fundamental importance of publicizing laws and making them available to citizens. In similar vein, John Gardner has argued that “those of us about to commit a criminal wrong should be put on stark notice that that is what we are about to do.”²⁷ He goes on to argue, developing Hart, that it is through the ideal of the rule of law that “the mental element in crime is connected with individual freedom.”

“According to the ideal of the rule of law, the law must be such that those subject to it can reliably be guided by it, either to avoid violating it or to build the legal consequences of having violated it into their thinking about what future actions may be open to them. People must be able to find out what the law is and to factor it into their practical deliberations. The law must avoid taking people by surprise, ambushing them, putting them into conflict with its requirements in such a way as to defeat their expectations and frustrate their plans.”²⁸

In the light of these widely respected standards, there are two major problems with the common law approach to omissions. First, the list of duty-situations remains open for judicial development, so

²⁵ For discussion, see Ashworth (n.10), 445-447; B. McSherry and B. Naylor, *Australian Criminal Laws: Critical Perspectives* (Melbourne, Oxford University Press 2004), pp. 442-444.

²⁶ L.L. Fuller, *The Morality of Law* (rev. edn, Yale University Press 1969), ch. II; and see also the discussion by J. Waldron, ‘The Concept and the Rule of Law’ (2008) 43 Georgia L.R. 1, at 7.

²⁷ J. Gardner, ‘Wrongs and Faults’, in A.P. Simester (ed.), *Appraising Strict Liability* (Oxford University Press 2005), 69-70.

²⁸ J. Gardner, ‘Introduction’, in H.L.A. Hart, *Punishment and Responsibility* (Oxford University Press 2008), xxxvi.

that individuals often cannot know whether their failure to intervene in a given situation will lead to liability for the serious offence of manslaughter. It is regarded as a fundamental principle that criminal legislation should not be retroactive, and that fair warning should be given, yet the judicial recognition of new duty-situations in these serious cases would seem to violate this.²⁹ In this vein the Law Commission of New Zealand has recommended that “in the interests of certainty and transparency” duties that are not set out in legislation should not be recognised:

“It is a cornerstone of the rule of law that people should only be held criminally liable for conduct that was criminal at the time that it occurred, so that, if they were inclined to do so, they would be able to ascertain whether it is prohibited. This is not possible in relation to the common law duties discerned by the courts from time to time; bluntly put, it invites the courts to “make it up as they go along” according to the circumstances of the individual case.”³⁰

Although this may seem a counsel of perfection, it is a necessary implication of taking the rule of law and its values seriously. Even if the five categories of duty are set out in legislation, it will be necessary for the courts to interpret them when applying them to the facts of particular cases. They may still take individuals by surprise.³¹ However, in principle the New Zealand Law Commission’s recommendation is to be preferred to the “hands-off” approach of the English Law Commission,³² particularly if combined with an explicit restraint on the judicial creation of new categories or extensions of existing categories.

The second major problem is that there may be nothing to put the individual on notice of the duty-situation, not least because there may be a widespread belief that there are few legal duties to care for one’s fellow human beings.³³ The parable of the good Samaritan is an

²⁹ Recognition of new duty-situations in cases such as *R v. Wacker* [2002] EWCA Crim 1944, [2003] Q.B. 1207, and *R v. Willoughby* [2004] EWCA Crim 3365, [2005] 1 W.L.R. 1880, is far more problematic than the English Court of Appeal admitted.

³⁰ Law Commission of New Zealand, *Review of Part 8 of the Crimes Act 1961: Crimes against the Person* (Report No. 111, 2009), para. 4.17. It has also been argued in the Canadian context that the creation of new duty-situations by the courts would “come precariously close to creating common law crimes contrary to section 9 of the *Criminal Code*”: K. Roach, *Criminal Law* (4th edn, Toronto, Irwin Law 2009), p. 109.

³¹ See the powerful arguments of Glanville Williams, ‘What should the Code do about omissions?’ (1987) 7 Legal Studies 92, 94–95.

³² See the text at n.6, 8 and 9 *ante*.

³³ Surveys suggest that the position is more nuanced: e.g. P.H. Robinson and J.M. Darley, *Justice, Liability and Blame: Community Views and the Criminal Law* (Boulder, Westview Press 1995), 42–50; and B. Mitchell, ‘Public Perceptions of Homicide and Criminal Justice’ (1998) 48 B.J. Crim. 453.

indication of what it may be morally right to do, but, we are told, not of the common law. This is quite a well-known difference of orientation between the common law and continental European criminal law. Thus the problem for the individual is that the existence of duty-situations is exceptional, since English law's general stance is not to impose legal duties to care for others, and that even where the courts have considered whether to impose a duty the boundaries often remain uncertain, as we noted particularly in categories (i) and (ii) above. The English Law Commission decided that the relevant law was too uncertain to re-state in codified form,³⁴ a position that Glanville Williams had earlier criticized pithily:

“If the top lawyers in a Government committee find the law hard to state clearly, what hope have the Stones and Dobinsons of this world of ascertaining their legal position, in advance of prosecution, when they find themselves landed with a hunger-striking relative?”³⁵

Unless governments make a concerted effort to communicate duty-situations to citizens, it is doubtful whether the criminal law on omissions conforms to the principle of legality.³⁶

III. DUTY-SITUATIONS RECOGNIZED IN STATUTE: OFFENCES OF OMISSION

In most jurisdictions it is normal for the legislature to create a number of offences of omission. Before exploring some features of statutory offences, it is important to note that there are some specific offences of omission at common law. One is the offence of misconduct in a public office, which can be committed by omission, as when a police officer stands by and fails to intervene when an offence is being committed (usually, a physical attack).³⁷ There is

³⁴ Law Commission (n.9), para. 5.43.

³⁵ G. Williams, *Textbook of Criminal Law* (2nd edn, London, Stevens & Sons 1983), p. 266.

³⁶ This was conceded by the Law Commission (n.9), para. 3.16. For the common law application of this standard, see Lord Bingham in *R. v. Rimmington and Goldstein* [2005] UKHL 63, [2006] 1 A.C. 459. In the U.K., the European Convention on Human Rights reinforces this requirement: see B. Emmerson, A. Ashworth and A. Macdonald (eds), *Human Rights and Criminal Justice* (2nd edn, London, Sweet & Maxwell 2007), ch. 10.

³⁷ A modern application of this ancient offence may be found in *R. v. Dytham* [1979] Q.B. 722 (Court of Appeal), where a police officer in uniform saw a man being beaten outside a night-club but took no steps to intervene or to summon assistance, and simply drove away.

also common law authority, for example, for an offence of failing to assist a constable when called upon to do so.³⁸

Many systems of criminal law contain considerable numbers of offences of omission of a regulatory kind. For example, the law of New South Wales contains many environmental offences that penalise omissions;³⁹ South African law has offences creating a whole range of reporting duties relating to money laundering, financial movements, corruption and of course road traffic accidents.⁴⁰ Such offences are now typical of most jurisdictions, and no purpose would be served simply by any further listing. But we should recognise that many systems of criminal law contain other offences which are not defined so as to make clear whether they may be committed by omission or not. Terms such as “act”, “cause” and “assist” may require judicial interpretation, and to that extent the citizen’s duties are unclear until the courts have spoken.⁴¹

Many Commonwealth jurisdictions have endeavoured to place in legislation the categories of duty-situations that will ground liability for homicide and perhaps other offences. Thus, Chapter 26 of the Nigerian *Criminal Code Act* 1990 sets out various “Duties in relation to the Preservation of Human Life”, including the duty to provide necessities to dependants, the duty to take care in medical procedures, the duty to take care of dangerous things, etc. The duty to provide necessities is a feature of several criminal codes, but its scope varies. Section 151 of the *Crimes Act* 1961 in New Zealand imposes a duty to supply the necessities of life to a vulnerable person in one’s charge who is “unable by reason of detention, age, sickness, insanity or any other cause to withdraw himself from such charge and unable to provide himself with the necessities of life.”⁴² This follows similar provisions in the Queensland, Western Australia and Tasmania codes,⁴³ which also have provisions imposing duties to care for children.⁴⁴ Section 215 of the *Criminal Code of Canada* creates an

³⁸ *R v. Brown* (1841) Car. & M. 314. See also s. 176 of the *Indian Penal Code* 1860, creating an offence of failure to assist a public servant when called upon to do so, and (among others) s.129(b) of the Canadian *Criminal Code* 1985.

³⁹ Brown, Farrier, Neal and Weisbrodt’s *Criminal Laws* (4th edn, Sydney, Federation Press 2006), para. 4.3.1.

⁴⁰ Burchell (n.15), 195.

⁴¹ See further Williams (n.35), 95-97.

⁴² Law Commission of New Zealand (n.30), paras 37-38, proposing an extension of s.151, on which see part 4 below. See also Model Criminal Code Officers’ Committee (n.23), cl. 5.1.7, duty to provide the necessities of life where D has assumed responsibility for someone unable to provide for himself or herself.

⁴³ *Queensland Code* s.285, *Western Australia Code* s.262, *Tasmanian Code* s.144; see also the application of sections 150 and 152 of the *Tasmanian Code* in *Tasmania v. Nelligan* (2005) 15 Tas. R. 142.

⁴⁴ See, e.g., the references in McSherry and Naylor (n.25), 124.

offence in a parent, spouse or guardian who fails to provide the necessities of life for a child, spouse or charge. English law has the offence of wilful neglect of a child,⁴⁵ as has Ugandan law.⁴⁶ These specific provisions are as important for what they exclude as for what they include, since it is a feature of codified criminal laws that courts should not extend the categories of duty beyond what is contained in the particular code. However, at a normative level they leave a number of issues for debate: what should be the limits of public duties to care for others, reinforced by the criminal law?

That question has aroused particular interest in two situations in recent years – deaths in custody and domestic violence. The responsibility of police and prison officers for the care of people in their charge was recognised in England and Wales in typical common law fashion when the courts found a duty towards arrestees and those in custody,⁴⁷ and it seems that the South African courts had reached a similar conclusion.⁴⁸ In South Australia the amended offence of criminal neglect might apply to some cases of this kind,⁴⁹ but it is not clear how many jurisdictions explicitly recognise such a duty.

However, new offences of omission have been enacted or recommended to deal with some issues of domestic violence in some jurisdictions. In England and Wales section 5 of the *Domestic Violence, Crime and Victims Act 2004* created the offence of causing or allowing the death of a child or vulnerable adult.⁵⁰ A person can only be convicted of this offence if he or she is a “member of the same household” as, and had “frequent contact” with, the vulnerable person. If that member of the household “was, or ought to have been, aware” of the risk of serious physical harm being caused to a child or vulnerable adult in that household by another member of the household, and failed to take reasonable steps to protect the vulnerable person, and the vulnerable person was killed, he or she may be found guilty of this offence and sentenced to up to 14 years’ imprisonment. Some may view this as a “duty of easy rescue” offence within the limited confines of the home; others may regard it as, in effect, an offence of complicity in homicide by omission. It is clearly an offence that imposes a duty to act, in circumstances where

⁴⁵ *Children and Young Persons Act 1933*, section 1.

⁴⁶ Ugandan *Penal Code* 1950, ss.156 and 157, and *Children Statute* 1996, s.6: see L. Tibatemwa-Ekirkubinza, *Homicides and Non-Fatal Assaults in Uganda* (Kampala, Fountain 2005), 10-11.

⁴⁷ *R. v. West London Coroner, ex p. Gray* [1988] Q.B. 467.

⁴⁸ Burchell (n.15), 194.

⁴⁹ This would depend on the interpretation of “vulnerable adult” (see n.51 *post*); for an expansive interpretation, see the English decision in *Khan*, n.51.

⁵⁰ For analysis, see J. Herring, ‘Mum’s Not the Word: an Analysis of Section 5, *Domestic Violence, Crime and Victims Act 2004*’, in C. Clarkson and S. Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Aldershot, Ashgate 2008).

the child or vulnerable adult is in serious peril, but where they may be family pressures not to intervene.⁵¹ South Australia has a similar provision,⁵² and among the jurisdictions considering such an offence is New Zealand, where the Law Commission has proposed its adoption.⁵³

IV. THE CASE FOR A GENERAL DUTY TO RENDER ASSISTANCE

Many continental European legal systems impose a “duty of easy rescue”, in the form of an offence of failing to render assistance to someone in peril. Like the common law offence of misconduct in a public office, this type of offence punishes the omission itself, rather than making it a ground for conviction of a more serious offence such as manslaughter. We now consider to what extent Commonwealth systems of criminal law have moved towards a “duty of easy rescue” offence, and to what extent they should do so.

South African law includes an offence based on breach of the duty of a driver involved in an accident to stop, to ascertain the nature and extent of injuries sustained by any person or any damage, and to render assistance.⁵⁴ The terms of that duty go beyond the more familiar duty to stop after the accident and to report it, and require positive assistance. Rather more limited, but still imposing a positive duty, is section 286 of the *Queensland Criminal Code* (which imposes a parental duty to protect children from physical harm). It has been recommended that section 151 of the New Zealand *Crimes Act* should be broadened so as to impose a duty on a parent to take reasonable steps to protect his or her child from injury. These provisions may alternatively be seen as versions of the homicide offence of “failure to protect”, discussed in part 3 above.

The law of Northern Territory in Australia goes further, and provides that “any person who, being able to provide rescue, resuscitation, medical treatment, first aid or succour of any kind to a person urgently in need of it and whose life may be endangered if it is not provided, callously fails to do so is guilty of a crime and is liable

⁵¹ See the case of *R. v. Khan and ors* [2009] EWCA Crim. 2, [2009] 1 W.L.R. 2036, where the husband was beating his newly-arrived wife frequently, his sisters and brother-in-law were aware of this and did not intervene, and eventually he beat her to death; he was convicted of murder, and the others were convicted of this offence for failing to take any steps to protect the wife from her husband's violence. Cf. somewhat similar common law developments in South Africa, described by Burchell (n.15), 192-193.

⁵² The offence was created in 2005 as s.14 of the *Criminal Law Consolidation Act* 1935; it covers liability for causing serious harm, as well as death, by failure to take steps to protect a child or vulnerable adult.

⁵³ Law Commission of New Zealand (n.30), paras 29-32.

⁵⁴ Burchell (n.15), 194, citing s.61 of the *National Road Traffic Act* 1996.

to imprisonment for 7 years.”⁵⁵ This is similar in terms to European “duty of easy rescue” provisions, although they tend to place more emphasis on the person’s capacity to assist without danger to herself or himself (see part 5 below).⁵⁶ Three decades ago the Law Reform Commission of Canada examined the case for such a general offence and, recommending its introduction into Canadian law, stated that “where one person’s life can only be preserved at the cost of another’s small inconvenience, the community conscience would be shocked at a refusal to shoulder the inconvenience.”⁵⁷ The Commission noted that such an offence is not a homicide offence, and is committed irrespective of whether the person in peril suffers death or serious injury. What such an offence does is to signal the need for citizens to offer some minimal assistance to persons *in extremis*, insofar as it lies within their power to do so without endangering themselves.

There seem to be three principles that combine to make a strong argument for recognition of a public duty of this kind: (a) the principle of urgency; (b) the priority of life; and (c) the principle of physical presence and capacity. These principles, which interact in practice, may be set out briefly here:

- (a) *The Principle of Urgency*: the case for recognizing a positive duty to act is at its strongest when there are circumstances of urgency or emergency. When action needs to be taken immediately, in order to preserve something of fundamental value, there is a clear argument for departing from the normal legal ordering.
- (b) *The Priority of Life*: the survival of each individual is a supreme value, as recognised by Article 6 of the International Covenant on Civil and Political Rights. Thus, combining (b) with (a), where urgent action is needed in order to preserve life, there is a strong argument for recognizing a duty to act. The same argument could be applied to the preservation of other human rights, such as the right not to be subjected to inhuman or degrading treatment or the right to liberty and security of person, but the strongest case is surely the survival of the rights-bearing subject – the right to life.
- (c) *The Principle of Physical Presence and Capacity*: where principles (a) and (b) already apply, the duty to act should fall on the person who is physically present and has the capacity to

⁵⁵ *Criminal Code Act* 1983 (Northern Territory), s.155, applied in *Salmon v. Chute and Dredge* (1994) 70 A.Crim.R. 536.

⁵⁶ For a translation of the German provision, see M. Bohlander, *The German Criminal Code* (Oxford, Hart 2008), 200, translation of s.323c.

⁵⁷ Law Reform Commission of Canada, *Omissions, Negligence and Endangering* (Working Paper 46, 1985), 19.

render some assistance. No duty could properly be cast on a person who is not physically present, except in cases where that person was already subject to a duty to safeguard another (*e.g.* a parent who ought to have been present, caring for his or her young child). The effect of physical presence is to connect the person who happens to be able to render assistance with the predicament of the other person whose life is in danger and who urgently needs that assistance.

These arguments are in conflict with the reasoning of Lord Macaulay, set out in Part I above. His view was that this is properly the province of morality and social obligation, and that enacting a “duty of easy rescue” offence risks criminalizing people in some completely inappropriate cases. On the latter point, it must be said that this has not been the experience of the continental European codes;⁵⁸ on the other hand, Macaulay’s principal concern was with a context in which starvation and begging were common, which is very different from the context of the European codes.

It may be noted that Bentham’s proposal that there should be a general duty to rescue seems to have been founded on some version of the three principles articulated above, although unusually Bentham did not articulate the reasoning behind his advocacy of extending the criminal law, and merely asked a rhetorical question:

“In cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?”⁵⁹

In the final analysis, the case for enacting a “duty of easy rescue” offence rests on one’s conceptions of the proper functions of the criminal law. Do the three principles set out above demonstrate that, despite Macaulay’s misgivings, the ultimate importance of human life should be signalled and supported by a widely publicised provision of this kind?

V. WHAT THE DUTY REQUIRES

Another question requiring resolution is this: granted that a duty-situation exists, and granted that the duty-bearing person is aware of

⁵⁸ See A. Ashworth and E. Steiner, ‘Criminal Omissions and Public Duties: the French Experience’ (1990) 10 Legal Studies 153.

⁵⁹ J. Bentham, *Principles of Morals and Legislation* (London 1789), Ch. XVII, para. 19; see also the footnote to this paragraph, where Bentham gives three examples of factual situations in which the duty would apply.

the facts that give rise to that duty,⁶⁰ what positive act or acts are required from the person who has the duty? This question gains importance from the principle of legality: the law ought to give fair warning and guidance to the person who has the duty, as to what the duty requires.

In English law this question is little discussed. It seems to be assumed that the duty is to achieve the result of saving life (categories (i) and (ii)), or preventing the commission of an offence (category (iii)), or preventing any further harm from occurring (category (iv)). However, that cannot be right. The obligation can only be to make efforts to bring about that result: at the most demanding, the duty could be to take all possible steps to avoid the undesired consequence, and that would probably be considered appropriate in categories (i) and (ii) where there is some kind of relationship, natural or assumed, between the two persons. The *German Penal Code* provision, for example, requires the person to do what “is possible without substantial danger to himself or without violation of other important duties.”⁶¹ This raises questions of *opportunity* and of *capacity*. Thus even if there is in principle the opportunity to take action, e.g. by jumping into water in an effort to save the other, there is no duty to do this if it would place the rescuer in “substantial danger” personally: that is a reference to the conditions prevailing at the time, and to the capacity of the rescuer (it would be different if the person present was an infirm octogenarian or a fit person of 30 who has trained as a lifeguard).⁶² In many situations it should be sufficient to call the emergency services, but then even that may sometimes be outside the person’s capacity. One of the worst features of the English decision in *Stone and Dobinson*, discussed above,⁶³ was that the Court of Appeal failed to take account of the limited intelligence and limited social skills of the two defendants. They did not know how to use a telephone, and were generally less able than normal citizens to organise their own lives, let alone those of others. Capacity should be a precondition of criminal liability for

⁶⁰ See *Harding v. Price* [1948] 1 K.B. 695; the inquiry here overlaps with the question of fault requirements, and the relevance of degrees of awareness is discussed by Alexander (n.14), 124-127.

⁶¹ See n.56 *ante*. The Northern Territory provision (n.55 and text) says little about opportunity and capacity, although the words “able” and “callously” could be construed so as to achieve the same effect.

⁶² The English criminal code team’s proposal – not adopted by the Law Commission – included the requirement that the person should do that which “in all the circumstances, including his age and other relevant personal characteristics, he could reasonably be expected to do”: Law Commission (n.7), cl.20.

⁶³ See n.17 *ante*, and accompanying text.

omissions,⁶⁴ and it should relate to the capabilities of the particular person(s) physically present. Account should also be taken of the effect of the situation on the person physically present: he or she may be in a state of shock or other emotional turmoil, and this ought surely to be taken into account when assessing capacity to act. It would be wrong to impose criminal liability for failing to do acts that cannot reasonably be expected of the individual in that situation.⁶⁵

Finally, we should return to rule-of-law principles. Are the duties imposed by a general duty of rescue likely to be sufficiently clear and certain? Phrasing those duties in terms of what can be expected under the circumstances, without substantial danger to the rescuer, would give some guidance to the person physically present, but not a great deal.⁶⁶ This is also a problem with rights such as self-defence, where the parameters of reasonableness are (in some jurisdictions) the only guidance for citizens. One improvement, also applicable to omissions cases, is for the law to set out some principles, even if they are non-exhaustive principles capable of being overridden in (unspecified) extreme circumstances. For example, the law could state that the primary duty is to call the emergency services, and that the secondary duty is to make reasonable efforts (without exposure to substantial danger) to render direct assistance to the person in peril. This may require a doctor or nurse to use their training to deal with someone injured in an accident, for example, whereas an untrained person might only be expected to give moral support or give basic practical help. How far the law can sensibly go in spelling out the nature of the duties is difficult to say. The important point is that respect for the rule of law requires some effort to be made to guide citizens in what might be expected of them in these extreme circumstances.

VI. QUESTIONS STILL UNRESOLVED

The conclusion to which the explorations in this article lead is that the law on criminal omissions is in a deeply unsatisfactory state in many common law jurisdictions. Its theoretical foundations are disputed, its limits are contested, and its contents are often afflicted with such uncertainty as to be inconsistent with “rule of law” values. On the general issue, Lord Macaulay’s view that omissions liability is

⁶⁴ For discussion, see A. Smart, ‘Responsibility for Failing to do the Impossible’ (1987) 103 L.Q.R. 532. See s.4.2(4) of the Commonwealth *Criminal Code Act* 1995 (Australia): “an omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing”.

⁶⁵ McAuley and McCutcheon (n.22), 197-198; those authors also make the point that the duty can be negated if the person in peril makes it clear that he or she wishes not to be rescued; *ibid.*, 199-200.

⁶⁶ Alexander (n.14), 130.

not the proper province of the criminal law still prevails, although he recognized some exceptions and various common law jurisdictions have added to that list in recent years. Five core duty-situations are widely agreed; yet, once the surface is scratched, it is apparent that the rationale for each of the categories is contested, and that there remains unresolved debate about the proper ambit of each duty. In some jurisdictions, like England and Wales, many of the duty-situations have been and are still created at common law by the courts, and the categories are subject to judicial development in a way that can operate retrospectively on individuals. In other jurisdictions where the duty-situations are set out in legislation, there is still some scope for judicial interpretation. Even when it is clear that a duty-situation arises, it is often not clear what the individual is expected to do: this aspect of omissions liability seems to have been little explored by law reform agencies or courts, leading to insufficiently clear prescriptions about public duties. All of this suggests that the rule of law is not properly respected in cases of omissions liability, and indeed that states are not discharging their obligation to set out the criminal law in a reasonably clear and accessible form.⁶⁷

Manifest as the failure to fulfil “rule of law” requirements is, that is essentially a deficiency in the *form* of the criminal law. There is still a battle to be fought, and unresolved questions to be answered, in relation to two issues of substance. First, should Lord Macaulay’s position still represent the common law, or are there strong enough arguments for extending omissions liability? It was suggested above that the principle of urgency, the priority of life, and the principle of physical presence and capacity are sufficiently persuasive to warrant an overdue re-appraisal of the common law’s stance on omissions and criminal liability. Secondly, and relatedly, what should be the nature of such omissions liability? It is often assumed that, if wider or more general duties were recognized, they would automatically become duties that would provide grounds for manslaughter convictions. But that is not a necessary step: in many continental European systems, the offence of failure to assist a person in peril is a separate crime, usually with a much lower maximum penalty than manslaughter.⁶⁸ Both these issues of substance, and the issues of form discussed above, ought to attract more attention from law reform agencies across the Commonwealth. The common law approach to criminal omissions is unsatisfactory both in theory and in practice: the time for reflecting and evolving is overdue.

⁶⁷ On which see A. Ashworth, ‘Ignorance of the Criminal Law, and Duties to Avoid it’ (2011) 74 M.L.R. 1.

⁶⁸ See n.56, *ante*, on the German penal code; for a similar view, see Williams (n.35), 108.

THE SODOMY OFFENCE: ENGLAND'S LEAST LOVELY CRIMINAL LAW EXPORT?

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ABSTRACT

This article describes the influence of the British Empire on the intercontinental spread of the criminal offences involving adult, private, consensual same-sex activity. It describes the origins of the crimes in Judeo-Christian scriptures and early English common law and statutory offences. The nineteenth century moves for criminal law codification in Europe succeeded in abolishing such offences. They were not a feature of other European empires. However, although codification of the criminal law failed in England, five template codes exported the sodomy and other like offences to every land ruled by Britain. In 41 of the 54 Commonwealth countries, the offences remain in force. The article describes how they were (often reluctantly) repealed by legislation between 1967 and 1997 in the older dominions. Repeal in newer Commonwealth countries has been slow or non-existent. The author describes new developments that give hope for progress, including the Naz Foundation case in India (2009) and the recent moves in the United Nations and elsewhere to foster legislative and judicial removal of this unlovely legacy of Empire.

THE PAST

It all goes back to the Bible. At least it was in the Old Testament *Book of Leviticus*, amongst “divers laws and ordinances”, that a proscription on sexual activity involving members of the same sex first relevantly appeared:

“If a man … lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon you.”¹

The prohibition appears amongst a number in ancient Israel, dealing with sexual irregularities. Thus, committing adultery with another man’s wife [strangely, not with a husband or a bachelor] attracted the penalty of death. A man who lies with his daughter-in-law shall be put to death with his victim, seemingly however innocent she might

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¹ *Leviticus*, 20, 13.

be.² The penalty is stepped up for a man who takes a wife and her mother. They, inferentially all of them, are to be “burnt with fire” so that “there be no wickedness among you”.³ A man that lies with a beast is to be put to death. As well as the poor animal.⁴ Somewhat inconsistently, there is a specific offence of a woman connecting with a beast.⁵ The punishment and the offences portray an early, primitive, patriarchal society where the powerful force of sexuality was perceived as a danger and potentially an unclean threat that needed to be held in the closest check.

According to those who have studied these things,⁶ the early history of England incorporated into its common law, an offence of “sodomy” in the context of the provision of protection against those who endangered the Christian principles on which the kingdom was founded. In medieval times, the notion of a separation between the church and the state had not yet developed. The church had its own courts to try and punish ecclesiastical offences, being those that were perceived as endangering social purity, defiling the kingdom and disturbing the racial or religious order of things.⁷

A survey of the English laws, produced in Latin in 1290 during the reign of Edward I,⁸ mentions sodomy, so described because the crime was attributed to the men of Sodom who thereby attracted the wrath of the Lord and the destruction of their city.⁹ In another description of the early English criminal laws, written a little later in Norman French, the punishment of burning alive was recorded for “sorcerers, sorceresses, renegades, sodomists and heretics publicly convicted”.¹⁰ Sodomy was perceived as an offence against God’s will, which thereby attracted society’s sternest punishments.

Initially, it seems, the offence was not limited to sexual acts between men. It could include any sexual conduct deemed irregular and extend to sexual intercourse with Turks and “Saracens”, as with

² *ibid.*, 20, 12.

³ *ibid.*, 20, 14.

⁴ *ibid.*, 20, 15.

⁵ *ibid.*, 20, 16.

⁶ An excellent review of the legal developments collected in this article appears in: Human Rights Watch, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism*, New York, December, 2008; and D. Saunders, ‘377 – And the Unnatural Afterlife of British Colonialism’ (unpublished, 5th Asian Law Institute Conference, National University of Singapore, May 22, 2008).

⁷ Human Rights Watch (n.6), 13.

⁸ See a survey of English law produced in the Court of Edward I in 1290: *Fleta, seu Commentarius Juris Anglicani* (ed. and tr. H.G. Richardson and G.O. Sayles, London, Quaritch 1955). See also Human Rights Watch (n.6), 13.

⁹ *Genesis*, 13, 11-12, 19, 5.

¹⁰ The work by Britton is described in H. Brunner, *The Sources of the Law of England* (tr. Williams Hastie, Edinburgh, T.T. Clark 1888). See also H.L. Carson, ‘A Plea for the Study of Britton’ (1914) 23 Yale Law Journal 664.

Jews and Jewesses.¹¹ Although the ideas were traceable to the Old Testament, and Jewish rabbinical law, the offences were reinforced by a Christian instruction that associated the sexual act with shame and excused it only as it fulfilled a procreative function.¹² Sodomy was a form of pollution. The history of the eleventh and twelfth centuries in England and in Europe included many instances of repression targeted at polluters, such as Jews, lepers, heretics, witches, prostitutes and sodomites.¹³

In the sixteenth century, following the severance by Henry VIII of the link between the English church and Rome, the common law crimes were revised so as to provide for the trial of previously ecclesiastical crimes in the secular courts. A statute of 1533, provided for the crime of sodomy, under the description of the “detestable and abominable Vice of Buggery committed with mankind or beast”. The offence was punishable by death. Although this statute was repealed in the reign of Mary I (so as to restore the jurisdiction of the church over such matters), it was re-enacted by Parliament in the reign of Elizabeth I in 1563.¹⁴ The statutory offence, so expressed, survived in England in substance until 1861. The last recorded execution for “buggery” in England took place in 1836.¹⁵

The great text writers of the English law denounced sodomy and all its variations in the strongest language. Thus, Edward Coke declared:

“Buggery is a detestable, and abominable sin, amongst Christians not to be named. ... [It is] committed by carnal knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast”.¹⁶

When William Blackstone, between 1765 and 1769, wrote his *Commentaries on the Laws of England*, he too included the “abominable crime” amongst the precious legacy that English law bequeathed to its people. By reason of the contemporaneous severance of the

¹¹ D.F. Greenberg, *The Construction of Homosexuality* (University of Chicago 1988), 274ff.

¹² Cf. J.A. Brundidge, *Sex, Law and Marriage in the Middle Ages: Collected Studies* (Aldershot, Variorum 1993).

¹³ R.I. Moore, *The Formation of a Persecuting Society* (London, Blackwell 1987). See also M. Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (London, Routledge 2002). See generally Human Rights Watch (n.6), 13-14.

¹⁴ M. Hyde, *The Love That Dared Not Speak Its Name: A Candid History of Homosexuality in Britain* (Boston, Little Brown 1970). The *Buggery Act* 1533, after its original repeal, was re-enacted as the *Buggery Act* 1563 during the reign of Elizabeth I.

¹⁵ Hyde, *ibid.*, 142. See Human Rights Watch (n.6), 13-14.

¹⁶ E. Coke, *The Institutes of the Laws of England* (London, E. and R. Brooke 1797) 3rd part, 58: cap. X, “Of Buggery, or Sodomy”.

American colonies from allegiance to the British Crown in 1776, Blackstone's *Commentaries* were to have a profound influence on the development and expression of the criminal law in the American settlements and elsewhere.¹⁷ So in this way, by common law, statute law and scholarly taxonomies, the English law criminalising sodomy, and other variations of "impure" sexual conduct was well-placed to undergo its export to the colonies of England as the British Empire burst forth on the world between the seventeenth and twentieth centuries.

The result of this history was that virtually no jurisdiction which at some stage during that period was ruled by Britain, escaped the pervasive influence of its criminal law and, specifically, of the anti-sodomy offence that was part of that law. The British Empire was, at first, highly successful as a model of firm governance and effective social control. At the heart of any such governance and control must be an ordered system of criminal and other public law. What better criminal law could the imperial authorities at Westminster donate to their many new-found colonies, provinces and settlements beyond the seas, than the criminal laws which they observed and enforced at home?

The consequence of this historical development and coincidence is that the anti-sodomy laws, applicable in Britain at the time of Coke and Blackstone, came swiftly to be imposed or adopted in the huge domain of the British Empire, extending to about a quarter of the land surface of the world, and about a third of its people. To this day, approximately 80 countries of the world impose criminal sanctions on sodomy and other same-sex activities, whether consensual or not or committed in private or not. Over half of these jurisdictions are, or were at one time, British colonies.¹⁸ The offence spread like a pestilence.

The nineteenth century in Europe witnessed a significant challenge to the inherited criminal laws of medieval times. In France, Napoleon's codifiers undertook a complete revision and re-expression of the criminal laws of royal France. This was an enterprise which Napoleon, correctly, predicted would long outlive his imperial battle honours. In the result, the sodomy offence, which had existed in France and was first repealed in 1791, was more effectively abolished in 1810, with the adoption of the *French Penal Code*. That code was to prove profoundly influential and quickly spread to more countries even than Britain ruled. It did so through derivative codes adopted, following conquest or example, in the

¹⁷ W. Prest, *Blackstone and His Commentaries: Biography, Law, History* (Oxford, Hart 2009), 3.

¹⁸ Human Rights Watch (n.6), 4. See D. Ottoson, *State-Sponsored Homophobia: A World Survey of Law Prohibiting Same-Sex Activity Between Consenting Adults* (International Gay & Lesbian Association Report, 1998).

Netherlands, Belgium, Spain, Portugal, Scandinavia, Germany, Russia, China, Japan and their respective colonies and dependencies. Although some of the latter occasionally, for local reasons, departed from the original French template¹⁹ and provided for sodomy offences, this was the exception. The consequence has been that virtually all of the countries of the European empires, other than the British, never imposed criminal sanctions specifically on adult same-sex consensual activity in private. The existence of such offences has been a peculiar inheritance of British rule and of societies influenced by the Shariah law of Islam. Such law, in its turn, traced its attitudes to religious understanding, in their turn, derived from the same Judeo-Christian scriptural texts as had informed the medieval laws of England.

Just as the Napoleonic codifiers brought change, and the termination of the religion-based prohibition on same-sex activities in France and its progeny, so in England a movement for codification of the law, including specifically the criminal law, gained momentum in the early nineteenth century. A great progenitor of this movement was Jeremy Bentham. He was the jurist and utilitarian philosopher who taught that the principle of utility, or the attainment of the greatest measure of happiness in society, was the sole justiciable object both of the legislator and the moralist.²⁰ Bentham was highly critical of the antique morality that he saw evident in the writings of Blackstone. In his *A Fragment on Government* (1776) and *An Introduction to the Principles of Morals and Legislation* (1789), Bentham strongly criticised Blackstone for his complacency about the content of the law of England as he presented it. Bentham attacked Blackstone's antipathy to reform where such was so evidently needed.

Encouraged by contemporary moves for legal reform in France, Bentham urged a reconsideration of those forms of conduct which should, on utilitarian principles, be regarded as punishable offences under the law of England. He continued to urge the acceptance of the utilitarian conception of punishment as a necessary evil, justified only if it was likely to prevent, at the least cost in human suffering, greater evils arising from putative offences. Bentham eventually turned his reforming zeal to plans for improved school education for the middle class; a sceptical examination of established Christianity and reform of the Church of England; as well as economic matters and essays treating subjects as diverse as logic, the classification of

¹⁹ Thus French colonies such as Benin (originally Dahomey), Cameroon and Senegal adopted such laws, possibly under the influence of their British ruled neighbours. Germany, in Bismarck's time, adopted para. 175 of the *German Penal Code*. This survived the Third Reich, being eliminated by the German Democratic Republic in 1957 and by the Federal German Republic in 1969.

²⁰ H.L.A. Hart, 'Jeremy Bentham', in A.W.B. Simpson (Ed.), *Biographical Dictionary of the Common Law* (London, Butterworths 1984), 44.

universal grammar and birth control. Somewhat cautiously, he also turned his attention to the law's treatment of what later became named as homosexuality.²¹

Bentham died in 1832. But not before influencing profoundly a number of disciples, including John Austin, who wrote his *Province of Jurisprudence Determined* (1832) and John Stuart Mill who wrote his landmark text *On Liberty* (1859). Mill, like Bentham, urged the replacement of the outdated and chaotic arrangements of the common law by modern criminal codes, based on scientific principles aimed at achieving social progress in order to enable humanity, in Bentham's words, "to rear the fabric of human felicity by the hands of reason and of law".²²

The movement for reform and codification of the criminal law gathered pace in England as a result of the response of scholars and parliamentarians to the efforts of Bentham and his followers. However, the attempts in the United Kingdom to introduce a modernised, simplified and codified penal law for Britain eventually came to nothing. The forces of resistance to Bentham's ideas (which he had described as "Judge and Co.", i.e. the bench and bar) proved too powerful. He had targeted his great powers of invective against the legal profession, charging it with operating, for its own profit and at great cost to the public, an unnecessarily complex and chaotic legal system in which it was often impossible for litigants to discover in advance their legal rights. The legal profession had their revenge by engineering the defeat of the moves for statutory reforms of the criminal law, although reform of the law of evidence was enacted after 1827.

What could not be achieved in England, however, became an idea and a model that could much more readily be exported to the British colonies, provinces and settlements overseas. So this is what happened. There were five principal models which the Colonial Office successively provided, according to the changing attitudes and preferences that prevailed in the last decades of the nineteenth century, when the British Empire was at the height of its expansion and power. In chronological order, these were:

- (i) the Elphinstone Code of 1827 for the presidency of Bombay in India;²³
- (ii) the *Indian Penal Code* of 1860 (which came into force in January 1862), known as the Macaulay Code, after Thomas Babington Macaulay (1800-59), its principal author;²⁴

²¹ *ibid.*, 45.

²² *ibid.*, 45. See also J. Anderson, 'J.S. Mill' in A.W.B. Simpson, *ibid.*, 364-5.

²³ *ibid.*, 45.

²⁴ M.B. Hooker, 'Macaulay' in A.W.B. Simpson, *ibid.*, 330.

- (iii) the Fitzjames Stephen Code based on the work of Sir James Fitzjames Stephen (1829-94), including his *A General View of the Criminal Law* (1863) and *Digest of the Criminal Law* (1877);²⁵
- (iv) the Griffith Code named after Sir Samuel Hawker Griffith (1845-1920), first Chief Justice of the High Court of Australia and earlier Premier and Chief Justice of Queensland, who had drafted his criminal code, adopted in Queensland in 1901, drawing on the *Italian Penal Code* and the *Penal Code of New York*;²⁶ and
- (v) the Wright Penal Code. This was based on a draft which was prepared for Jamaica by the liberal British jurist R.S. Wright, who had been heavily influenced by the ideals of John Stuart Mill. Wright's draft code was never enacted in Jamaica. However, curiously, in the ways of that time, it became the basis for the criminal law of the Gold Coast which, on independence in 1957, was renamed Ghana.²⁷

Although there were variations in the concepts, elements and punishments for the respective same-sex offences in the several colonies, provinces and settlements of the British Empire, a common theme existed. Same-sex activity was morally unacceptable to the British rulers and their society. According to the several codified provisions on offer, laws to criminalise and punish such activity were a uniform feature of British imperial rule. The local populations were not consulted in respect of the imposition of such laws. In some instances (as in the settler colonies), no doubt at the time, the settlers, if they ever thought about it, would have shared many of the prejudices and attitudes of their rulers. But in many of territories in Asia, Africa and elsewhere where the laws were imposed and enforced, there was no (or no clear) pre-existing culture or tradition that required the punishment of such offences. They were simply imposed to stamp out the “vice” and “viciousness” amongst native peoples which the British rulers found, or assumed, to be intolerable in a properly governed society.

The most copied of the above templates was the *Indian Penal Code* of Macaulay. The relevant provision appeared in Chapter XVI, titled “Of Offences Affecting the Human Body”. Within this chapter, section 377 appeared, categorised under the sub-chapter titled “Of Unnatural Offences”. The provision read:

“377. Unnatural Offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman

²⁵ S. Uglo, ‘Stephen’ in A.W.B. Simpson, *ibid.*, 486.

²⁶ A.C. Castles, ‘Griffith’ in A.W.B. Simpson, *ibid.*, 217.

²⁷ M.L. Freeland, ‘R.S. Wright’s Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law’ (1981) 1 Oxford Journal of Legal Studies 307.

or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.²²⁸

This provision of the *Indian Penal Code* was copied in a large number of British territories from Zambia to Malaysia, and from Singapore to Fiji. The postulate inherent in the provision, so defined, was that carnal activities against the order of nature violated human integrity and polluted society so that, even if the “victim” claimed that he had consented to it, and was of full age, the act was still punishable because more than the individual’s will or body was at stake. The result of the provision was that factors of consent, or of the age of the participants or of the privacy of the happening, were immaterial. Legally, same-sex activities were linked and equated to the conduct of violent sexual criminal offences. Consensual erotic conduct was assimilated to the seriousness of prohibited acts of paedophilia.

The Griffith Penal Code for Queensland was not only the basis for the provisions of the criminal codes in those jurisdictions of Australia which opted for a code (Western Australia, Tasmania and eventually the Northern Territory). It was also widely copied outside Australia, not only in the neighbouring territory of Papua New Guinea (where effectively it is still in force) but in many jurisdictions of Africa, including present-day Nigeria, Kenya, Uganda and Tanzania. The *Queensland Penal Code* introduced into the *Indian Penal Code*’s template a particular notion stigmatising the category of “passive” sexual partners who “permit” themselves to be penetrated by another male. Thus, section 208 of the Queensland code provided:

“Any person who –
(a) has carnal knowledge of any person against the order of nature; or
(b) has carnal knowledge of an animal; or
(c) permits a male person to have carnal knowledge of him or her against the order of nature

is guilty of a felony and is liable to imprisonment for 14 years.”²²⁹

This version of the offence (“person”) not only extended it to women participants, but cleared up an ambiguity of the provision in the *Indian Penal Code*. The Queensland code made it clear that both partners to the act were criminals. It also widened the ambit beyond

²⁸ *Naz Foundation v. Delhi & others* [2009] 4 L.R.C. 838 (Delhi High Court), [3].

²⁹ Human Rights Watch (n.6), 22.

“penetration” by introducing an independent provision for “attempts to commit unnatural offences”³⁰.

In some jurisdictions of the British Empire, when the anomalies of the legislation were pointed out, provision was made (as in Nigeria and Singapore) to exempt sexual acts between “a husband and wife” or (as in Sri Lanka) to make it clear that the unspecified offences of carnal acts against the “order of nature” extended to sexual activities between women.

I can recall clearly the day in my first year of instruction at the law school of the University of Sydney when I was introduced to this branch of the law of New South Wales. That state of Australia had resisted the persuasion of the codifiers. Like England, it had preferred to remain a common law jurisdiction, so far as the criminal law was concerned. That law was the common law of England, as modified by imperial statutes extended to the colonies and by colonial and later state enactments. In the last year of the reign of Queen Victoria, the colonial parliament of New South Wales, just before federation, enacted the *Crimes Act* 1900 (NSW), still in force. Part III of that Act provided for the definition of “Offences against the Person”. A division of those offences was headed “Unnatural Offences”. The first of these provided, in section 79:

“79. *Buggery and Bestiality*: Whosoever commits the abominable crime of buggery, or bestiality, with mankind, or with any animal, shall be liable to penal servitude for 14 years.”.

This provision was followed by one, similar to the *Queensland Penal Code*, providing for attempts (s.80) and another providing for indecent assaults (s.81).

Three years before I came to my acquaintance with section 79, the State Parliament had enacted new sections, probably in response to the ceaseless urgings of the State Police Commissioner (Colin Delaney) for whom homosexual offences represented a grave crisis for the moral fibre of Australian society. The new offence included additional punishment for those who, in a public place, solicited or incited a male person to commit any of the foregoing unnatural offences.

Possibly in response to concern about the unreliability of police evidence in such offences, the State Parliament added a provision (s.81B(2)) requiring that a person should not be convicted of such an offence “upon the testimony of one person only, unless such testimony is corroborated by some other material evidence implicating the accused in the commission of the offence.” By 1955,

³⁰ Ss.6 and 29. See Human Rights Watch (n.6), 23.

in Australia, the infection of hatred had not yet died. But new anxieties were beginning to surface.

As I listened to the law lecturer explaining peculiarities of the unnatural offences, including the fact that, in law, adulthood and consent were no defence and both parties were equally guilty;³¹ the availability of propensity evidence and evidence of similar facts;³² and the heavy penalties imposed upon conviction,³³ I knew that these provisions were targeted directly and specifically at me. I could never thereafter share an unqualified belief that the inherited criminal law of Australia was beyond criticism. Along with others of my generation, I concluded that there was a need for modernisation and reform.

THE PRESENT

The criminal laws introduced into so many jurisdictions by the British imperial authorities remained in force in virtually all of them long after the Union Jack was hauled down and the plumed Britannic viceroys departed, one by one, their imperial domains.

Occasionally, the needs of a particular territory were reflected in modifications of the statutory provisions before the end of British rule. Thus, in the Anglo-Egyptian Sudan, the *Sudanese Penal Code* of 1899 contained an adaptation of the *Indian Penal Code*. Uniquely among the British colonies, this introduced the requirement of lack of consent for most versions of the offence, but not where one of the participants was a teacher, guardian, person entrusted with the care or education of the victim, or where the victim was below the age of 16 years. Likewise, in the Sudanese code, the crime of “gross indecency” was only punishable where it was non-consensual.³⁴ Inferentially, these variations on the *Indian Penal Code* were introduced to reflect the colonial administrators’ understanding of the then current sexual customs and practices in that relatively late addition to their area of responsibility. The distinctions in the colonial code survived in Sudan until 1991 when the government imposed an undifferentiated sodomy offence, justified by reference to the requirements of Shariah law. Similar moves are reported³⁵ in other post-colonial Islamic societies, including Northern Nigeria and

³¹ R. v. McDonald (1878) 1 S.C.R.(N.S.) (L.) 173.

³² O’Leary v. The King (1947) 20 Australian Law Journal 360 (High Court of Australia); cf. Julius Stone, ‘Propensity Evidence in Trials of Unnatural Offences’ (1943) 15 Australian Law Journal 131.

³³ Veslar v. The Queen (1955) 72 W.N.(N.S.W.) 98 (New South Wales Court of Criminal Appeal).

³⁴ Human Rights Watch (n.6), 21-22, referring to A. Gledhill, *The Penal Codes of Northern Nigeria and the Sudan*, (London, Sweet & Maxwell 1963), 443.

³⁵ Human Rights Watch (n.6), 22.

Pakistan, described as involving a “toxic mix” of the influence of the two international streams that explain most of current criminal prohibitions against consenting adult private same-sex conduct (the British and Islamic).

As the centenary of the formulation of the *Indian Penal Code* approached in the middle of the twentieth century, moves began to emerge for the repeal or modification of the same-sex criminal offences, commencing in England itself and gradually followed in all of the settler dominions and European jurisdictions.

The forces that gave rise to the movement for reform were many. They included the growing body of scientific research into the common features of human sexuality. This research was undertaken by several scholars, including Richard Krafft-Ebing (1840-1902) in Germany; Henry Havelock Ellis (1859-1939) in Britain; Sigmund Freud (1856-1939) in Austria; and Alfred Kinsey (1894-1956) in the United States. The last, in particular, secured enormous public attention because of his unique sampling techniques and the widespread media coverage of his successive reports on variation in sexual conduct on the part of human males and females.³⁶

The emerging global media and the sensational nature of Kinsey’s discoveries ensured that they would become known to informed people everywhere. Even if the sampling was only partly correct, it demonstrated powerfully that the assumption that same-sex erotic attraction and activity was confined to a tiny proportion of wilful anti-social people was false. Moreover, experimentation, including acts described in the criminal laws as sodomy and buggery, treated as amongst the gravest crimes, was relatively commonplace both amongst same-sex and different-sex participants. If such acts were so common, the questions posed more than a century earlier by Bentham and Mill were starkly re-presented. What social purpose was secured in exposing such conduct to the risk of criminal prosecution, particularly where the offences applied irrespective of consent, age and circumstance and the punishments were so severe?

A number of highly publicised cases in Britain, where the prosecution of well-known public figures appeared harsh and unreasoning, set in train in that country widespread public debate and, eventually, the formation of committees throughout the United Kingdom to support parliamentary moves for reform. Eventually, a royal commission of inquiry was established, chaired by Sir John

³⁶ A. Kinsey *et al.*, *Sexual Behaviour in the Human Male* (W.B. Saunders, 1948); Kinsey *et al.*, *Sexual Behaviour in the Human Female* (W.B. Saunders, 1953).

Wolfenden, a university vice-chancellor.³⁷ The commission's report recommended substantial modification and containment of homosexual offences, removing adult consensual conduct from the ambit of the criminal law. The Wolfenden Committee expressed its principle with near unanimity in terms that would have gladdened the heart of Jeremy Bentham:³⁸

“Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.”.

As a result of the report, important debates were initiated in Britain involving leading jurists.³⁹ Excuses were advanced, by the government of the day for not proceeding with the reform, generally on the footing that British society was “not yet ready” to accept the proposals.⁴⁰ Ultimately, however, private members’ bills were introduced into the House of Commons and the House of Lords, by proponents of reform, neither of whom was homosexual.

Within a decade of the Wolfenden Report, the United Kingdom Parliament changed the law for England and Wales.⁴¹ At first, the age of consent was fixed by the reformed law at 21 years and there were a number of exceptions (relating to the armed forces and multiple parties). The law did not at first apply to Scotland or Northern Ireland. Eventually, the age of consent was lowered to be equal to that applicable to sexual conduct involving persons of the opposite sex. The other exceptions were repealed or confined. Reforming laws were then enacted for Scotland and Northern Ireland. The last-mentioned reform was achieved only after a decision of the European Court of Human Rights held that the United Kingdom was in breach of its obligations under the *European Convention on Human Rights* by continuing to criminalise the private consenting sexual conduct of adult homosexuals in that province.⁴²

³⁷ *Report of the Committee on Homosexual Offences and Prostitution (Wolfenden Report)* (Cmnd 247, 1957). See also M.D. Kirby, ‘Lessons From the Wolfenden Report’ (2008) 34 Commonwealth Law Bulletin 551.

³⁸ Wolfenden Report, *ibid.*, 187-8.

³⁹ P. Devlin, *The Enforcement of Morals (Maccabean Lecture in Jurisprudence of the British Academy)* (OUP 1959); H.L.A. Hart, ‘Immorality and Treason’, *The Listener* (July 30, 1959), 162. The Devlin/Hart debates are described in N. Lacey, *The Life of H.L.A. Hart – the Nightmare and the Noble Dream* (OUP 2004), 243.

⁴⁰ A. Grey, *Quest for Justice – Towards Homosexual Emancipation* (London, Sinclair-Stevenson 1992), 84.

⁴¹ *Sexual Offences Act 1967*.

⁴² *Dudgeon v. U.K.* (1981) 4 E.H.R.R. 149.

The engagement of the European Court (made up substantially of judges from countries long spared of such offences through the work of Napoleon's codifiers) spread eventually to the removal of the criminal offences from the penal laws of the Republic of Ireland⁴³ and Cyprus,⁴⁴ to whom Britain had earlier made that gift. In consequence, the law of Malta was also reformed. Later cases (as well as the discipline of the Council of Europe upon Eastern European countries which had followed the Soviet imposition of such offences) led to repeal in each of the European nations aspiring to membership of the Council and of the European Union.

The influence of the legislative reforms in the country from which the imperial criminal codes had been received resulted, within a remarkably short time, in the legislative modification of the same-sex prohibition in the penal laws of Canada (1969),⁴⁵ Australia (1974), New Zealand (1986), Hong Kong (1990) and Fiji (2005 by a High Court decision). Likewise, a decision of the Constitutional Court of South Africa in 1988⁴⁶ struck down the same-sex offences as incompatible with the post-apartheid constitution of that country. In that decision, Ackermann J. said:

“The way in which we give expression to our sexuality is the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.”⁴⁷

To the same end, the Supreme Court of the United States of America (another country which, with few exceptions, inherited its criminal law from the British template), eventually,⁴⁸ by majority, held that the offence enacted by the State of Texas, as expressed, was incompatible with the privacy requirements inherent in the United States Constitution.⁴⁹ Kennedy J., writing for the court, declared:

“... [A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the constitution allows homosexual persons the right to make this choice. ...”

⁴³ *Norris v. Republic of Ireland* (1988) 13 E.H.R.R. 186.

⁴⁴ *Modinos v. Cyprus* (1993) 16 E.H.R.R. 485.

⁴⁵ *Criminal Law Amendment Act* 1968-69, s.7.

⁴⁶ *National Coalition for Gay and Lesbian Equality v. Minister of Justice* [1998] 3 L.R.C. 648; 1999(1) S.A. 6 (S.A.C.C.).

⁴⁷ *ibid.*, at 32.

⁴⁸ After a false start in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁴⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

When homosexual conduct is made criminal by the law of the state, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and the private spheres.”⁵⁰

In Australia, the journey to reform was not always easy. It began with removal of the offences in the *Crimes Act* 1900 (NSW) which were then (1975) applied to the Australian Capital Territory, a federal responsibility. Reform of the law in South Australia followed (1976). One by one, the other states of Australia, by parliamentary action, amended their criminal laws to remove the “unnatural offences”. Amongst the last to make the change were Western Australia (1989) and Queensland (1990). In each of those states, the distaste at feeling obliged to repeal the template of the *Queensland Penal Code* then applicable, was given voice in parliamentary preambles which expressed the legislature’s discomfiture. Thus, in Western Australia, the preamble introduced in 1989, and finally settled in 1992, expressly stated:

“Whereas the Parliament disapproves of sexual relations between persons of the same sex; [and] of the promotion or encouragement of homosexual behaviour ...”

And whereas the Parliament does not by its act in removing any criminal penalty for sexual acts in private between persons of the same sex wish to create a change in community attitudes to homosexual behaviour ... [or of] urging [young persons] to adopt homosexuality as a life style ...”⁵¹

Still, the old defences were modified by the provision of a defence if the accused believed, on reasonable grounds, that a girl victim was over 16 years of age or a male over 21.⁵²

In Queensland, where the legislators were called upon to repeal the provision continued in the original source of the Griffith Code, a preamble was also enacted only slightly less disapproving:

“Whereas Parliament neither condones nor condemns the behaviour which is the subject of this legislation ... [but] reaffirms its determination to enforce its laws prohibiting sexual interference with children and intellectually impaired persons and non-consenting adults.”⁵³

For the first time, the Queensland law introduced a reference to the then growing significance of the dangers of HIV/AIDS by then a consideration in the Australian reform discourse:

⁵⁰ *ibid.*, 567, 575.

⁵¹ *Law Reform (Decriminalisation of Sodomy) Act* 1989 (W.A.); *Acts Amendment (Sexual Offences) Act* 1992 (W.A.).

⁵² *Criminal Code Act* 1913 (W.A.), s.186(2) (since repealed).

⁵³ *Criminal Code and Another Act Amendment Act* 1990 (Qld), Preamble.

“And whereas rational public health policy is undermined by criminal laws that make those who are at high risk of infection unwilling to disclose that they are members of a high-risk group.”

Only one Australian jurisdiction held out, in the end, against repeal and amendment, namely Tasmania. In that state, a variation of the *Queensland Penal Code* continued to apply.⁵⁴ Endeavours to rely on the dangers of HIV/AIDS to attain reform failed to gain traction. Eventually, immediately after Australia, through its federal government, subscribed to the First Optional Protocol to the *International Covenant on Civil and Political Rights*, a communication was made by way of complaint to the Human Rights Committee in Geneva. This argued that, by criminalising private same-sex conduct between consenting adults, the law of Tasmania brought Australia, in that jurisdiction, into breach of its obligation under the covenant.

In March 1994, the Human Rights Committee of the United Nations in *Toonen v. Australia*⁵⁵ upheld the complaint and found Australia in breach. The majority of the committee did so on the basis of a breach of Article 17 (privacy). A minority report suggested that there were other breaches in relation to discrimination on the grounds of sex and of the requirement to treat persons with equality. Reliant upon the Human Rights Committee’s determination, the Australian Federal Parliament enacted a law to override the Tasmanian same-sex prohibition, purporting to act under the external affairs power in the Australian Constitution.⁵⁶ The validity of the law so enacted⁵⁷ was then challenged by Tasmania in the High Court of Australia. That court in *Croome v. Tasmania*⁵⁸ dismissed an objection to the standing of one of the successful complainants to Geneva in seeking relief against the Tasmania challenge. With this decision, the Tasmanian Parliament surrendered. It repealed the anti-sodomy offence of that state. It was not therefore necessary for the High Court to pass on the constitutional validity of the federal law. In all Australian jurisdictions, the old British legacy had been removed by legislation and the democratic process. It had taken 20 years.

For a long time, no further significant moves were made in non-settler countries of the Commonwealth of Nations to follow the lead of the legislatures in the old dominions and the courts in South Africa and Fiji. On the contrary, when a challenge was brought to the

⁵⁴ *Criminal Code Act* 1924 (Tas.), s.122.

⁵⁵ (1994) 1 International Human Rights Reports 97 (No.3).

⁵⁶ *Australian Constitution*, s.51 (xxix).

⁵⁷ *Human Rights (Sexual Conduct) Act* 1994 (Cth), s4. The section relied on and recited Art. 17 of the covenant.

⁵⁸ (1998) 191 C.L.R. 119 (High Court of Australia).

Supreme Court of Zimbabwe in *Banana v. The State*,⁵⁹ seeking to persuade that court to follow the privacy and equality reasoning of the South African Constitutional Court, the endeavour, by majority, failed.

Another setback was suffered in Singapore, which, like Hong Kong, was a small common law jurisdiction with a prosperous Chinese society unencumbered by cultural norms of Judeo-Christian origin, except as grafted onto them by their temporary British colonial rulers. In Hong Kong, the then territory's law reform commission supported the Wolfenden principles and favoured their introduction.⁶⁰ The change was effected in 1990 after vigorous advocacy by the local homosexual community and its friends. But the course of reform in Singapore was less favourable.

In 2006, the Law Society of Singapore delivered a report proposing repeal of section 377A of the *Singapore Penal Code*. Apparent support for the course of reform was given by the influential voice of the foundation Prime Minister (and “Minister Mentor”) Lee Kuan Yew. However, a fiery debate ensued in the Singapore Parliament where opponents of reform justified the continuance of the colonial provision on the basis that it contributed to “social cohesiveness”; reflected “the sentiments of the majority of society”; and that repeal would “force homosexuality on a conservative population that is not ready for homosexuality”.⁶¹ The result was that the reform bill was rejected, although the prime minister made it clear that the laws would not generally be enforced, so that gays were welcome to stay in, and come to, Singapore, inferentially so long as they preserved a low profile and observed the requirements of “don’t ask don’t tell”.

Occasional glimmerings of hope of reform arose in particular countries of the Commonwealth where the same-sex prohibitions were repealed, such as The Bahamas. However, these instances of encouragement had to be counter-balanced against the violence of popular culture in other Caribbean countries (especially Jamaica) in the form of homophobic rap music; the denunciation of “the homosexual lifestyle” by leaders in African countries such as Robert Mugabe (Zimbabwe), Daniel arap Moi (Kenya), Olusegun Obasanjo (Nigeria) and Yoweri Museveni (Uganda). The successive prosecutions for sodomy in Malaysia of an opposition politician, Anwar Ibrahim, were strongly supported by that country’s leader (Dr. Mahatir). In Jamaica (2004) and in Uganda (2011), leading advocates of law reform were brutally murdered against a backdrop of verbal

⁵⁹ [2004] 4 L.R.C. 621 (Zimbabwe Supreme Court) (Gubbay C.J.Z. dissenting).

⁶⁰ Law Reform Commission of Hong Kong, *Laws Governing Homosexual Conduct* (1982).

⁶¹ M. Aidil, ‘Re-Scoping S. 377A: A Juxtaposition of Views’, *Juris Illuminae*, Vol. 3, No. 3 (January 2007) (Singapore).

calumny in popular culture, politics and sections of the media. On the face of things, the scene in these Commonwealth countries looks grim and forbidding. Only Nelson Mandela, father of South Africa's multi-racial democracy, spoke strongly in Africa against the proposition that homosexuality was "un-African". For him, it was "just another form of sexuality that has been suppressed for years. ... [It] is something we are living with."⁶² Still, the advocacy of change in many such countries is dangerous and risky. The future looks bleak.

THE FUTURE

Against this background, a remarkable development occurred in India on July 2, 2009. The Delhi High Court (constituted by A.P. Shah C.J. and S. Muralidhar J.) on that day handed down its long awaited decision in *Naz Foundation v. Delhi & others*.⁶³ The court unanimously upheld a challenge brought by the Naz Foundation against the validity of the operation of section 377 of the *Indian Penal Code*, to the extent that the section criminalised consensual sexual conduct between same-sex adults occurring in private. At a stroke, the court liberated large numbers of the sexual minorities described by the scientists, defended by Wolfenden, freed by legislation elsewhere, but kept in legal chains by the enduring penal code provisions of the British Empire.

Curiously, before the Delhi High Court, the Union Ministry of Health & Family Welfare joined with other health respondents to the proceedings to support the foundation's challenge. The Union Ministry of Home Affairs, on the other hand, appeared to oppose relief and to assert that section 377 reflected the moral values of the Indian people. This is not the occasion to recount every detail of the judicial opinion of the Delhi High Court which was immediately flashed around the world, not only because of its potential importance for India beyond Delhi, but also because of its possible significance in the many other Commonwealth countries which retain identical or like provisions in their criminal codes and enjoy identical or like constitutional provisions, such as were the source of the relief provided by the court.

The participating judges:

- traced the history of the *Indian Penal Code*,⁶⁴

⁶² N. Mandela, in Gift Sipho Siso and Barrack Otieno 'United Against Homosexuality', *New African* (December 1, 1999), quoted in Human Rights Watch (n.6), 110.

⁶³ [2009] 4 L.R.C. 838 (Delhi High Court) (n.28).

⁶⁴ *ibid.*, 847,848, [2]-[5].

- identified the nature of the challenge⁶⁵ and of the specific interest of the Naz Foundation which works in the field of HIV/AIDS intervention and prevention;
- set out the response of the respective Union governmental agencies⁶⁶ and of other respondents in the case, many of them supporting the Naz Foundation;⁶⁷
- invoked the right to life and the protection of personal dignity, autonomy and privacy under the Indian Constitution;⁶⁸
- marked out the context of global trends in the protection of the privacy and dignity rights of homosexuals, many of them noted above;⁶⁹
- noted the absence of a compelling state interest to intrude into such private and intimate conduct and, on the contrary, the strong contrary conclusion in the context of the AIDS epidemic;⁷⁰ and
- concluded that section 377 violated the constitutional guarantee of equality under Article 14 of the Constitution of India;⁷¹ and impermissibly and disproportionately targeted homosexuals as a class.⁷²

The Delhi court concluded that the provisions of section 377 were severable in so far as they applied to offences against minors (for which there was no other equivalent law in the same-sex context);⁷³ and that the ultimate affirmation of the notion of equality in the Indian Constitution, upheld in the decision, represented an underlying theme which was essential because of the very diversity of the Indian society upon which the Constitution operated.⁷⁴

The decision of the Delhi High Court in the *Naz Foundation* case is presently subject to appeal to the Supreme Court of India. At the time of writing this article, its decision is not known. It may be expected later in 2011. But whatever the outcome, no appellate court could ever re-configure the state of the law or of society to the conditions prevailing in India prior to the delivery of the judgment in *Naz*. The discourse has shifted. Significantly, the Government of India elected not to appeal against the decision of the Delhi court.

⁶⁵ *ibid.*, 848, [6]-[10].

⁶⁶ *ibid.*, 850-853, [11]-[18].

⁶⁷ *ibid.*, 853-855, [19]-[23].

⁶⁸ *ibid.*, 856-865, [25]-[52].

⁶⁹ *ibid.*, 865-868, [53]-[59].

⁷⁰ *ibid.*, 868-880, [60]-[87].

⁷¹ *ibid.*, 880-883, [88]-[93].

⁷² *ibid.*, 883-889, [94]-[115].

⁷³ *ibid.*, 893-895, [12]-[128].

⁷⁴ *ibid.*, 985-896, [129]-[131].

It was content to leave the authority of the decision to stand as stated, with the high implication, thereby, that it would be observed in all other parts of the nation. The Supreme Court of India will in due course reveal its conclusion. But the discourse in India (and in the many other countries where the same or similar provisions of the imported criminal codes apply) has changed.

Yet, notwithstanding this hopeful sign, the prospect of change in the other 41 jurisdictions of the Commonwealth of Nations that continue to criminalise same-sex conduct still appears discouraging. But, here too, several things are happening which may be occasions for cautious optimism, at least in the long term. Most of these developments arise in the context of responses by the global community to the HIV/AIDS epidemic. It is, to some extent, unpalatable to support the important arguments advanced by Bentham and many reformers since, for the winding back of the criminal law to its proper realm of operation, on grounds based on the pragmatic concern to respond effectively to the HIV epidemic. At one stage in the reasoning in the *Naz Foundation* case, as the distinguished Indian judges move to their conclusion, they quote from remarks that I had made shortly before to a conference of the Commonwealth Lawyers' Association held in Hong Kong.⁷⁵ The Delhi High Court must have discovered my remarks on the internet. They noted that my observations had been offered in the context of an analysis (similar to that set out above) concerning the criminal codes "imposed on colonial people by the imperial rulers of the British Crown".⁷⁶ As stated in the *Naz Foundation* case, and accepted by the Delhi High Court, I contended that the criminalisation of private, consensual, adult homosexual acts was wrong:

- “— Wrong in legal principle because they exceed the proper ambit and function of the criminal law in a modern society;
- Wrong because they oppress a minority in the community and target them for an attribute of their nature that they do not choose and cannot change. In this respect they are like other laws of colonial times that disadvantaged people on the ground of their race or sex;
- Wrong because they fly in the face of modern scientific knowledge about the incidence and variety of human sexuality; and
- Wrong because they put a cohort of citizens into a position of stigma and shame that makes it hard to reach

⁷⁵ M.D. Kirby, 'Homosexual Law Reform: The Ongoing Blind Spot of the Commonwealth of Nations' (Commonwealth Law Conference, Hong Kong, April 8, 2009).

⁷⁶ *Naz Foundation* case (n.63), 879, [85].

them with vital messages about safe sexual conduct, essential in the age of HIV/AIDS.”⁷⁷

Of the foregoing errors, only the last is relevant to the HIV epidemic and AIDS. Yet this is now an important line of reasoning upon which hang many international attempts to persuade countries that still adhere to their colonial legacy to think again and to change by legislation or judicial decision, their local equivalents to section 377 of the *Indian Penal Code* that was the provisions before the Delhi High Court.

This is not the occasion to identify all of the developments that are occurring. However, they include:

1. Repeated statements by the Secretary-General of the United Nations (Mr. Ban Ki-moon), urging member states to change their legal proscriptions of this kind without delay. Thus, on January 25, 2011, in remarks to the session of the Human Rights Council in Geneva, the Secretary-General said:

“Two years ago I came here and issued a challenge. I called on this council to promote human rights without favour, without selectivity, without any undue influence We must reject persecution of people because of their sexual orientation or gender identity ... who may be arrested, detained or executed for being lesbian, gay, bisexual or transgender. They may not have popular or political support, but they deserve our support in safeguarding their fundamental human rights.

I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice cannot justify any violation of human rights When our fellow human beings are persecuted because of their sexual orientation or gender identity, we must speak out. That is what I am doing here. That is my consistent position. Human rights are human rights everywhere, for everyone.”⁷⁸

The Secretary-General has made many similar statements. They are backed up by strong international declarations of commitment in the context of HIV/AIDS.⁷⁹ His words are supported by like statements on the part of the Administrator of the United Nations Development Programme, the

⁷⁷ *ibid*, 889-895, [116]-[128].

⁷⁸ Ban Ki-moon, Secretary General of the United Nations, “Remarks to the Human Rights Council” (Geneva, January 25, 2011).

⁷⁹ United Nations, General Assembly, 65th session, *Implementation of the Declaration of Commitment on HIV/AIDS and the Political Declaration on HIV/AIDS* (Report of the Secretary-General, March 28, 2011)

Director-General of the World Health Organisation, the United Nations High Commissioner for Human Rights, the Executive Director of UNAIDS and other United Nations voices. Rarely has the world organisation spoken with such unanimity and unvarnished clarity.

2. Additionally, the United Nations Development Programme has established a Global Commission on HIV and the Law. The chairman of this body is Federico Henrique Cardoso, former President of Brazil. It includes in its numbers several distinguished lawyers of the common law tradition, legislators and other experts. I am myself a member of the commission. In considering the areas of law reform that are required to strengthen the global response to the continuing epidemic of HIV/AIDS which each year claims about 2.6 million lives, the commission has identified several fields of law for priority action. These include criminal laws that impede successful strategies to support prevention of the spread of HIV and to respond effectively to the needs of those who are infected and vulnerable to infection for medical care and therapy. It may be expected that the global commission will turn its attention to the legacy of imperial criminal codes as they continue to apply in so many countries of the common law world and beyond.
3. A third source of action is the Eminent Persons Group (EPG) of the Commonwealth of Nations. This body arose out of the Trinidad and Tobago Affirmation that followed the Commonwealth Heads of Government Meeting (CHOGM) held in Port of Spain, Trinidad in October 2009.⁸⁰ I am a member of the Eminent Persons Group. Among the priority areas requiring attention, identified by the group, is the response of Commonwealth nations to the HIV/AIDS epidemic. Although Commonwealth countries comprise one-third of the world's population, it is estimated that two-thirds of those who are currently living with HIV or AIDS are Commonwealth citizens.⁸¹ The Eminent Persons Group has drawn this fact to the notice of the Commonwealth leaders. It will be an important component of the group's report. That body will recommend that those laws that may impede a successful strategy against HIV and

⁸⁰ 'Trinidad and Tobago Affirmation of Commonwealth Values and Principles', in Commonwealth Heads of Government Meeting (27-29 November 2009), *Trinidad and Tobago Outcome Documents* (Commonwealth Secretariat 2010), 7, [13].

⁸¹ United Nations Development Programme, *Comparative Table of HIV Infection in the World* (2010).

AIDS should be considered for reform and prompt action. The alternative is that the nations that have received the unlovely legacy of same-sex criminal prohibitions will continue to watch as their citizens and residents become infected and die in conditions of poverty, stigma and shame.

In the post-imperial age, there are no gunships that can be sent to enforce the messages of reform voiced in the United Nations, by United Nations Development Programme or by the Commonwealth Eminent Persons Group. No armed force or coercive military action can be brought to bear. All that is available is the power of ideas and persuasion that is based on the experience of other countries. But there is also the argument of self-interest because the impact of HIV is not only devastating in personal terms. It is also an enormous burden on the economies of the countries that persist with their current disabling legislation. Where human rights, individual dignity and relief from suffering do not prove persuasive, other means must be deployed including economic arguments and the force of international good opinion.

The *Naz Foundation* case demonstrates that the power of international law and good example today is a force far more potent than even the coercive orders of the Privy Council were, at the heyday of British imperial power. Words spoken in conferences will sometimes be read and will enter the minds of legislators and judges worldwide. Decisions of final national courts will be published in the *Law Reports of the Commonwealth*, on the internet and in journals that make their way to equivalent courts in other lands. Journals such as this and associations such as ours, will bring wisdom and good experience beyond our own lands to colleagues elsewhere who, so far, are walking in darkness.

This is now the global reality of the law. In that global community, we who share the English language, have a special, added advantage. We can readily communicate ideas with one another in the English language and through courts, legislatures and other institutions that share many commonalities. The anti-sodomy offences and same-sex criminal prohibitions of the British Empire constitute one target of communication that needs to be enhanced, expedited and accelerated.

This imperative does not exist only to achieve an effective response to the AIDS epidemic. It is also there for the proper limitation of the criminal law to its appropriate ambit; for an end to oppression of vulnerable and often defenceless minorities; for the adoption of a rational attitude to empirical scientific evidence about human nature; and for the removal of a great unkindness and violence by state authorities that has burdened human happiness for too long, precisely as Jeremy Bentham wrote 200 years ago.

TWENTY YEARS OF RESTORATIVE JUSTICE IN NEW ZEALAND – REFLECTIONS OF A JUDICIAL PARTICIPANT

*JUDGE F.W.M. McELREA**

New Zealand has had twenty interesting years' experience of restorative justice, in one form or another. As someone involved throughout that period, I should offer some reflections of possibly wider interest. What have we learned that may assist the cause of criminal justice, both here and in other English-speaking¹ countries?

First, what is restorative justice? I use the term here to mean an approach to wrongdoing that brings together those most affected by the wrong – both victims and offenders – preferably in a face-to-face meeting, to acknowledge the harm done and consider how best to redress that harm and prevent similar harm in the future. Restorative justice is not a single technique or procedure, and has application beyond the criminal justice system.²

1990 was New Zealand's first full year of operation of the new youth court system for dealing with young offenders – and the year of my appointment as a youth court judge. By then, I had found my feet as a district court judge (appointed in 1988). I continued in this role, dealing with adult offenders, and thereby seeing two different systems in operation.³ One was the English-based, adversarial system of criminal justice for people aged 17 and over, and the other a home-grown system centred on family group conferences that, along with youth courts, had been introduced by the *Children, Young Persons and their Families Act 1989*.⁴

The family group conference model quickly came to be seen as essentially restorative in nature, although it had not been designed with "restorative justice" in mind. Indeed that term did not circulate

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¹ I have used this term to include not only Commonwealth countries but the United States of America.

² Different restorative techniques include family group conferences, adult restorative conferences, victim-offender mediation, healing circles, and a variety of other "restorative practices". Outside the criminal justice system, restorative justice is applied in some schools, work places and even in dealing with infringing trade practices.

³ District court judges in New Zealand have both civil and criminal jurisdiction. The latter includes all summary matters and most trials of indictable offences, the remainder being dealt with in the High Court.

⁴ Henceforth, "the 1989 Act".

in New Zealand until 1993, which was after the distinctive nature of the new youth court system had been recognised.⁵

Family group conferences in New Zealand are convened and facilitated by an independent person employed by the state, on receipt of a “referral” from either a youth court or a police youth aid officer. The court does this for all cases that are admitted or proved in court. The police may do so in any case where the 1989 Act prevents them arresting a young person and taking them to court – these are “diversionary conferences”, as I mention shortly. There is state funding for lawyers at the former but not the latter. The young person is entitled to a lawyer at any conference, but their role is that of adviser and supporter rather than advocate. Matters that are denied have to be proved in court in the usual way, *i.e.* with the burden of proof on the prosecution.

The following aspects of the family group conference system stand out after 20 years⁶ as being both innovative and of potential value to adult systems as well:

- A real attempt was made to divert offenders away from the court system altogether. This was achieved by making diversionary conferences the default option – *i.e.* charges could not be laid in court *unless* certain criteria were met.⁷ As a result, almost half of all family group conferences have not been court-directed⁸ and the matter has been handled without any court appearance whatsoever. In addition, other diversionary practices adopted by the police, using their

⁵ In 1993, Howard Zehr’s account of restorative justice in *Changing Lenses* (Herald Press, 1990) first started making waves in New Zealand.

⁶ I remained a youth court judge until 2001 when I gave up this work and instead worked as an alternate environment judge – again, while continuing my role as a district court judge. I acknowledge the leadership of Principal Youth Court Judge Andrew Becroft in the last 10 years, and that of his predecessors – Principal Youth Court Judges Mick Brown and David Carruthers – all of whom have been great supporters of restorative justice. Chief District Court Judge Russell Johnson and his predecessors are in the same category.

⁷ See s.245 of the 1989 Act. Diversionary conferences (also called “intention to charge” conferences) are initiated – and attended – by the police. However, New Zealand does not subscribe to the practice in some parts of Australia, Canada and the U.K. of having the police run the conferences. There is always an independent facilitator in charge. If agreement can be reached as to an outcome that does not involve the laying of charges, then no charges are laid – so long as the outcome is implemented.

⁸ The figure is 49.3% of all referrals over the last 10 years, although a small (but unknown) percentage of referrals will not have resulted in a conference, and another small (but unknown) percentage of diversionary family group conferences will have resulted in charges being laid in court. A reasonable estimate is that about 40% of all family group conferences do not follow or precede a court appearance by the young person – which is a significant number.

discretion whether to prosecute or not, have helped reduce the use of courts.

- There are no gate-keepers deciding which cases go to a conference, and no limit on the seriousness of offences that can be dealt with.⁹ Other countries have limited family group conferences to first offenders, or to property offences, or to cases approved by the police or a judge. The comprehensive nature of the New Zealand system was fundamental to its success. As a result we can speak from considerable experience – there have been over 75,000 family group conferences in the last 10 years, so well over 100,000 (I do not have an exact figure) in the two decades.
- There was a deliberate move away from the notion that therapeutic experts “know best”, thereby enabling family-and community-based knowledge to guide outcomes.
- The legislation strongly encouraged accountability measures mixed with community-based, remedial outcomes, rather than punishment for the sake of punishment. This resulted in a massive reduction in custodial outcomes, as well as in custodial remands pending sentencing.
- One result of these first four features was that many expensive institutions were able to be closed, and court sittings dealing with young people were greatly reduced. The changes produced unquantified but substantial savings – not only in dollar terms, but also in terms of the unintended damage that those institutions can cause.
- State-paid officials, called youth justice coordinators, arranged and facilitated family group conferences. Volunteer input was limited to those assisting conferences by attending as community or family members. The professionalism of the coordinators, grounded in a strong set of statutory principles, was essential to making the system work.¹⁰ (Over the years the battle has been to retain that special youth justice or “accountability” focus when the coordinators have

⁹ This general statement has three qualifications: (i) murder and manslaughter cases are outside the 1989 Act (s.272); (ii) at the opposite end of the scale, traffic offences that are fineable only are dealt with in a district court (s.272(3)); and (iii) for “purely indictable offences” (in some countries called felonies), a youth court has a discretion (s.275) as to whether the matter remains in the youth court or is dealt with in an adult court: in my experience only the most serious cases were excluded from the youth court. If the matter remains in the youth court and is admitted, it must be referred to a family group conference.

¹⁰ A procedure based on clear principles, rather than a model “script” for the conference, distinguishes family group conference practice in New Zealand from that in some other jurisdictions.

been organised within the largely “welfare” culture of social workers in what was the Social Welfare Department and is now the Child Youth and Family service of the Ministry of Social Development.)

- Related to this, specialist police officers called youth aid officers handle all cases involving children or young people, and specialist lawyers called youth advocates are provided for all alleged offenders in youth courts. In my view both groups have been highly effective in their different roles and have really entered into and implemented the principles of the 1989 Act, but the general body of police and lawyers have failed to embrace the principles governing family group conferences – because of their training in a more adversarial and punitive model of justice.
- The family group conference model has only been truly restorative when it has involved victims, and treated them as of equal importance to offenders.¹¹ Unfortunately victim involvement in conferences – which of course is entirely voluntary – has been variable, ranging from 80 per cent of family group conferences down to around 40 per cent, and currently around 50 per cent. Further, even when victims attend conferences it is difficult for a system to treat offenders and victims equally when it is designed and funded to deal with offenders. Widespread attendance and participation of victims at family group conferences depend entirely on the good practice of youth justice coordinators; without further legislative change, and proper training, good practice goes only so far in overcoming this imbalance.
- Young offenders retained the right to elect trial by jury on offences carrying more than three months’ imprisonment (s.274), but hardly ever exercised that right. Clearly they and their advisers saw it as more beneficial to remain within the youth court jurisdiction, where punishment played a part but the main emphasis was on remedial and rehabilitative outcomes.
- The family group conference model is receptive to different cultural influences, and can accommodate indigenous, European and immigrant cultures with little difficulty.¹²

¹¹ Under s.251 of the 1989 Act, victims or their representatives are entitled to attend any family group conference.

¹² Subject to some basic requirements set out in the 1989 Act, a family group conference “may regulate its procedure in such manner as it thinks fit”: s.256. Thus Maori (the indigenous people of New Zealand) and Pacific Island communities, when dealing with offending within their own communities, are able to follow their own protocols for the conduct of meetings, use their own language, and produce

Both Maori and Pacific Island communities in New Zealand had argued for a model that empowered families and communities, and were influential in the shaping of the 1989 legislation. However, I have never heard it said that family group conferences work only for those cultures – on the contrary, the process can be adapted to all cultures, and where different cultures are involved (*e.g.* as family or supporters of victim and offender) the conference process can be an important agent in building a sense of community across cultures.

- Monitoring of family group conference outcomes, to ensure they are implemented, is important for the parties, and for the credibility of the system. An example of the adaptation of the general family group conference model to the values of Maori communities is the establishment of “Rangatahi courts”. These are special youth court sittings convened on Maori marae or meeting places, and using Maori language and customs. They discuss how family group conference plans will be implemented and monitored. Local elders and other knowledgeable community leaders will sit with the judge as advisers to bring specific Maori cultural perspectives into the process. Maori judges preside in these courts and the young people are encouraged to appreciate fully the connectedness of their lives and actions to their ancestors and natural surroundings, as well as to their whanau (family) and wider community.
- Finally, the 1989 Act avoided the formalities of “pleading” to charges, something inherently linked to the adversary model.¹³ Under section 246 of the 1989 Act, where a young person is brought before a youth court, he is asked, after he has had the opportunity of taking legal advice, whether he denies the charge. If he does, the matter goes straight to a defended hearing (with all the protection of due process). In any other case, the matter must be referred to a family group conference, where the first issue to be dealt with will be whether the charge is admitted.¹⁴ Nearly all charges are admitted. The use of this language (“denied” or

outcomes that are culturally appropriate for the young person and reinforce cultural values.

¹³ A plea of “Not Guilty” might mean “You prove it”, rather than “I did not do it”. A system that emphasises accountability and taking responsibility for one’s own actions puts the emphasis on the latter.

¹⁴ See s.259. In practice, therefore, the terms used at the first appearance in court are “denied” and “not denied” and, at a family group conference, “admitted” or “not admitted”. These broadly follow the language used in the Act.

“admitted”), rather than the pleader’s equivalents (“Not Guilty” or “Guilty”), has helped change the focus from legal technicalities to accountability and taking responsibility for harm done to victims and the wider community; and this has been achieved while preserving a defendant’s right to defend the charges in court in the usual way.

New Zealand’s experience of the new youth court model strongly influenced the development of restorative justice for adults, and ultimately in spheres other than criminal justice, *e.g.* education.¹⁵ In 1994, at a conference of all district court judges, I presented a paper that described the restorative aspects of the family group conference model and invited their adoption in adult courts. The same year saw the first such case before me, proceeding with the consent of victim and offender, and the establishment of the first of many community groups of volunteers trained in conference facilitation.¹⁶ These groups provided reports on individual cases to sentencing courts where judges had granted adjournments for a restorative conference to be held. In each case the presiding judge had simply used his or her discretion to grant an adjournment so that information that might be relevant to sentencing could be put before the court. No commitment was made that the process would affect the outcome, and nor was any future judge obliged to consider the conference report.¹⁷

While family group conferences deal with all manner of cases, some relatively trivial and some extremely serious, adult conferences have in the most part been for moderately serious offending – assaults (including assaults with a weapon), burglary, robbery, embezzlement, careless or dangerous driving causing death.¹⁸ I, and many others, feel that the more serious the harm, the greater the need for healing on the victim’s part and the greater the potential for restorative justice.

¹⁵ Many schools, here and elsewhere, convene restorative conferences to deal with offending at school by young people. These schools usually have a lower rate of suspensions and expulsions from school as a result.

¹⁶ These groups initially arranged their own training and evolved an admirable set of principles and standards for this purpose. Once the Ministry of Justice started subsidising (one cannot say “paying for”) some “provider group” costs, the ministry introduced its own training system, which still continues.

¹⁷ However, if the judge directed that the matter come back to himself or herself – as usually happened in those early years – all concerned would know that the report would be carefully considered. In all cases, the defendant’s consent was first obtained, so conditions of bail requiring attendance at the conference were unnecessary but could be imposed.

¹⁸ “Moderately serious offending” was the focus of a pilot scheme in four district courts (as to which, see *post*, p.51), later expanded to several other courts. However, other provider groups dealt mostly with less serious cases that the police were happy to see diverted through a community panel process. Both types of groups are funded by the Ministry of Justice.

So what sort of difference does restorative justice make to sentencing? It can make the difference between a term of imprisonment and some other outcome;¹⁹ between longer or shorter sentences of imprisonment;²⁰ or it may influence the type of non-custodial sentence to be imposed.²¹

A number of the innovative attributes of family group conferences are characteristic of restorative justice as it has developed in the adult courts. These include an emphasis on putting right the wrong, rather than punishment for punishment's sake; the avoidance of adversarial procedures and attitudes – but the retention of adversarial procedures for dealing with defended cases; the empowering of those directly affected by wrongdoing – importantly, victims – to consider meaningful ways of dealing with the wrongdoing; the ability to adapt procedures to accommodate cultural differences;²² and the seeking of consensus about outcomes amongst those affected, rather than the imposition of outcomes “from above”. However, the process for adults differed from family group conferences in that it was entirely voluntary

¹⁹ In *Kingi and McEwen v. New Zealand Police* CRI-2007-483-4 (High Court, Wanganui, September 6, 2007, Simon France J.) the High Court on appeal set aside terms of imprisonment of four and five months for assault with intent to injure where restorative justice outcomes had been agreed and implemented, involving written apologies, 250 hours' community work, reparation payments to the victim, and attending remedial counselling. Simon France J. commented that the role of the restorative justice process was more integral than in merely reducing the length of a prison term, as it “weighed in the crucial decision of custodial sentence or not.” In the light of the success of the conference and the defendants' compliance with its outcomes, the defendants were discharged without conviction, the appellate judge noting (para. 55) that “appropriate penalties had been served; remorse was immediate and genuine; reconciliation had occurred;” and some other factors.

²⁰ In *R. v. Buttar* [2008] NZCA 28, the Court of Appeal upheld sentences imposed in a district court of imprisonment for 30 months and 42 months where reductions of 30 to 35 per cent were allowed on account of the restorative processes followed, together with a statement relating to the cultural background of the offenders as permitted under the *Sentencing Act 2002*, s.27 (which enables an adult court to receive evidence or advice on cultural factors affecting the offending, the offender or any proposed sentence). The Court of Appeal noted that the district court judge had considered that the restorative processes had already addressed many of the sentencing purposes, which included deterrence within the Sikh community to which the defendants belonged. (This was a defence appeal, not a Crown appeal, but an appellate court can increase a sentence of its own motion if it feels it is inadequate. The discounts applied in the district court were regarded as generous but were not disturbed.)

²¹ Good examples are found in the area of environmental offending, where imprisonment is possible but heavy fines are common. There are several cases where more imaginative outcomes have been agreed at a restorative conference and accepted by the court, along with a lesser fine. See, for example, *Northland Regional Council v. Perkins* CRN 09088500008 (District Court, Whangarei, October 13, 2009, Newhook D.C.J.). In that case a fine of only \$1,000 was indicated if the defendant implemented the remedial and preventative outcomes of the restorative justice plan.

²² *Sentencing Act 2002*, s.27.

(attendance at family group conferences by victims *but not young offenders* was voluntary).²³ This has had both advantages and disadvantages.

One advantage was that restorative justice for adults could get underway without any enabling legislation. All that it needed was a judge prepared to adjourn the case for a conference report, and to consider that report (without any commitment to adopt its outcomes). There were many such judges in the district courts and later some in the High Court. Outcomes could be enforced in a variety of traditional ways – *e.g.* using sentences of community work, reparation and/or supervision – or simply by putting off final disposition until the conference plan had been completed (a common youth court procedure).²⁴ Sometimes custodial sentences were still imposed, but for a shorter term where other sentencing objectives had already been achieved.

The positive experience of these cases then encouraged the Ministry of Justice (as it now is) to fund a three-year pilot scheme for restorative justice in four district courts, with a positive evaluation later ensuing. This in turn led to the extension of Ministry of Justice funding of restorative justice cases beyond the four “pilot” courts and to various restorative principles and procedures being incorporated into New Zealand’s first full codification of sentencing law, the *Sentencing Act 2002*. Thus, section 7 lists the purposes for which a court may sentence or otherwise deal with an offender as including “(a) to hold the offender accountable for harm done to the victim and the community by the offending; or (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or (c) to provide for the interests of the victim of the offence; or ...”. Importantly, under section 8, the court “must take into account any outcomes of restorative justice processes that have occurred”.

A second advantage is that conferences only occur where both victim and offender agree to meet,²⁵ which must lead to a better commitment to the process and the outcome than if adult offenders

²³ There is no offence of failing to attend a family group conference, but such a failure invites a remand in custody, or youth court jurisdiction being declined for a purely indictable matter, or both. Where a young person fails to attend a diversionary conference the police can simply lay the charges in court. In fact attendance rates by young offenders have always been high – a product also of family involvement in the conference, no doubt.

²⁴ At that point a defendant could be discharged without further formal sentence (*i.e.* discharged with or without conviction), or subject to the usual type of sentences depending on what had occurred in the meantime.

²⁵ Even so-called victimless crimes are amenable to restorative justice, as there are usually secondary victims – *e.g.* in drugs cases, the wife or partner whose housekeeping money has been squandered on drugs.

were forced into it.²⁶ The situation with young people is slightly different, in that young offenders – in my experience – are generally prepared to be held accountable and nearly always admit their offending; hearings where liability is denied are very much the exception. This willingness to “own up” is perhaps more true in a family setting (including a family group conference), and may not carry through to an adult setting dominated by an adversarial culture and legal advice that the defendant can (or should) “put the prosecution to the proof”.

As denials are unusual amongst young offenders, making the process compulsory (even for those cases proved after a defended hearing) has little impact overall from a victim’s perspective. This would probably not be true in the adult system, where offenders are more likely to be “in denial” (assuming they were rightly convicted – *a fortiori* if they were wrongly convicted) and worthwhile meetings would be less common.²⁷

However, we should not make the opposite mistake, of thinking that feelings of remorse by an offender are a prerequisite to a restorative conference. “Owning up” and feeling remorseful are different experiences. The latter is commonly (I would say, *usually*) the outcome of a well-facilitated conference – something felt because of empathy with the victim’s plight, personally experienced in a face-to-face setting (or sometimes more remotely, as when a victim sends a representative to the conference). But there may be no remorse present beforehand. Of course, in some types of case, such as accidental injury or death through a work accident or careless driving of a motor vehicle, remorse at a pre-conference stage is quite common, and those cases make for good conferencing because the opportunity (and need) for apology, reparation and mutual support is present.

A major disadvantage of a fully voluntary system is that restorative justice can easily remain on the fringe of the criminal justice system. Despite the good work done by many people over two decades,

²⁶ Although young offenders are compelled to attend family group conferences, there remains a voluntary element in their participation: the young offender can decline to agree to the outcome plan that other participants might support, so that there is no consensus and therefore no outcome of the conference. His or her sentence is then entirely in the hands of the youth court judge. This happens rarely, but is an available remedy where the young person might otherwise be coerced into agreeing to a particular outcome.

²⁷ One would hope, however, that the defendant’s attitude of denial would be conveyed to the victim as part of the pre-conference preparation, so that forewarned victims would not face “re-victimisation” by attending such a conference. That is, the risks of a compulsory system for offenders might be minimised by good practice in dealing with victims; but where denial persists, the process would be largely pointless, which is why, in New Zealand, admission of the offending is a prerequisite of adults entering a restorative process.

restorative justice for adults is still very much the exception in New Zealand. My estimate is that the total number of cases where restorative conferences are held for criminal wrongdoing by adults would be less than 2,000 per year²⁸ – which, on one estimate, is only five per cent of cases that meet the ministry's criteria for funding.²⁹

Why is the usage of restorative justice for adults so low, despite supportive legislation? Lack of funding is obviously one factor. This is frustrating, because reduced reoffending rates, and reduced use of imprisonment in restorative justice cases, make the economics compelling. In the United Kingdom politicians are starting to confront the advantages of a less punitive and more preventative and victim-friendly approach – even if only for fiscal reasons. There is little sign of that yet in New Zealand, where there has been an unholy alliance between the media and most politicians to promote the illusion that punitive reactions promote community safety – despite all the evidence to the contrary. The Ministry of Justice evaluation of the New Zealand pilot scheme showed a 17 per cent reduction in the use of imprisonment coupled with a nine per cent reduction in reoffending measured after two years, and a 50 per cent reduction in the seriousness of offences where participants did reoffend. High rates of victim satisfaction were recorded, as has been shown in youth justice studies as well. So the second reason is the political climate just described – although, in fairness, it is not uniform, and there are signs of change.

The third reason is that so long as restorative justice is a voluntary process for offenders, key professionals (*e.g.* police, lawyers and judges) are able to ignore it, or (as anecdotal evidence suggests of some police) actively to discourage its use.³⁰ The complete opposite is true of the family group conference, where the model is mandated for virtually all cases. My explanation for the attitude of these

²⁸ The Ministry of Justice is currently providing (some) financial support for only about 1,400 court cases each year, and the Department of Corrections funds a handful of post-sentencing restorative conferences in prisons. This seriously limits the number of cases handled by provider groups, although some take on more cases than their funding covers. There are also restorative conferences held where the provider is paid a fee which is part of the agreed outcome, *e.g.* in environmental offending prosecuted under the *Resource Management Act* 1991. Such cases are outside the ministry's figures, but would be a small number.

²⁹ That funding is directed, broadly, at cases involving reasonably serious offending, *i.e.* offences carrying possible prison sentences. The figure given is from a personal communication.

³⁰ This has been true in New Zealand despite the *Victims' Rights Act* 2002, s.9, which states that “a judicial officer, lawyer for an offender, member of court staff, probation officer, or prosecutor” is to “encourage the holding of a [victim and offender] meeting” in certain circumstances – probably because section 10 then makes such obligation unenforceable! S.9 has therefore been largely ignored – in my view a predictable result.

professionals in adult courts has been previously offered in terms of the domination of the adversary system:

“The adversary ethos is so deeply imbedded in our legal structures, the legal profession, and the judges, who (in common law countries) are drawn from the profession, that restorative justice is continually pushed to the margins, despite the encouragement of the legislators.”³¹

Does this mean that restorative justice for adults will flourish only if it is compulsory? That is one option, but I believe it is not the only one. The alternative is that restorative justice is given a non-court setting in which to operate, just as diversionary family group conferences were available from the outset under the 1989 Act. This may require some state funding, which I suggest should be under the control of the Ministry of Social Development, as officials in the Ministry of Justice are just as likely to be wedded to a court-based system as the professionals operating in the courts.³² Such a system could be fully voluntary,³³ or could be by law the default way for dealing with the same range of offences as are handled in youth courts, with the existing adult courts handling the remaining cases and those where agreement cannot be reached, or the outcome is not implemented after a conference.

For those seeking a more satisfying, less damaging, and cheaper form of justice, the way forward, in my view, is clear. It is not suitable in all cases, but with some principled support and seed funding, restorative justice could easily change the landscape of the criminal justice system in most common law jurisdictions.

³¹ F.W.M. McElrea, ‘Restorative justice as a procedural revolution: some lessons from the adversary system’ (Fourth International Winchester Restorative Justice Conference, October 10, 2007).

³² I have argued over the years in favour of community justice centres able to perform this role. Attempts (*e.g.* in the city of New Plymouth) to obtain funding from the Ministry of Justice for this purpose have not succeeded.

³³ By “fully voluntary”, I mean that it would require the agreement of defendant, victim and (if already involved) the police. However, as with diversionary family group conferences, the police could still lay charges unless at the conference it was agreed on all sides that they were not necessary. Such agreement would normally be conditional on any plan being implemented by the defendant within the agreed timeframe, so that the right to lay formal charges provides the incentive to perform the agreement.

“NON-CONVICTION” DNA DATABASES AND CRIMINAL JUSTICE: A COMPARATIVE ANALYSIS

*LIZ CAMPBELL**

ABSTRACT

Common law countries share a growing receptiveness to the use of DNA (deoxyribonucleic acid) in criminal investigation and prosecution, with the formalisation and steady expansion of schemes of DNA collection and retention. Despite a general consensus regarding the significance and value of genetic material in criminal justice, there is considerable divergence in terms of the populations from whom DNA may be collected and the length of time for which DNA may be retained. This article takes a comparative approach by assessing the trajectory of the law relating to DNA collection and retention in a range of common law jurisdictions, and ascertains how aspects of particular countries’ laws seek to resolve common problematic issues that arise concerning human rights, in particular the rights to bodily integrity, of privacy and the presumption of innocence. It identifies a common international movement to a risk-based approach and concludes that of the comparator jurisdictions the Canadian model provides the most fitting accommodation for human rights in DNA database expansion.

I. INTRODUCTION

Legal systems across the Commonwealth and beyond share a growing receptiveness to the use of DNA (deoxyribonucleic acid) in criminal investigation and prosecution, with the formalisation and steady expansion of schemes of DNA collection and retention. Gathering genetic material from crime scenes and individuals and running checks against existing records entail numerous potential benefits in the crime control sense: the ready and speedy identification of suspects, the exclusion of innocent and wrongly suspected parties from police focus, the exoneration of the wrongfully convicted, and the deterrence of some would-be criminal actors due to the increased chance of detection. Moreover, on-going storage of genetic material permits speculative or “cold” searching which hastens investigations and may provide leads for hitherto unsolved crimes. This contributes to a general consensus regarding the significance and value of genetic material in criminal investigations; however, common law countries diverge considerably in terms of the populations from whom DNA may be acquired and the length of

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time for which DNA may be retained. Collecting DNA from convicted adults and storing it in state databases is seen now as a relatively uncontroversial and proportionate incursion on human rights, given that it is predicated on a finding of guilt, but policies and practices relating to children and to unconvicted persons are more contentious normatively speaking and thus far from settled in a legal sense.¹

This article takes a comparative approach in assessing the trajectory of the law relating to DNA collection and retention in a number of common law jurisdictions, and ascertains how aspects of particular laws seek to resolve common problematic issues that arise concerning human rights. The focus here is on competent adults alone, rather than also including children which would necessitate consideration of issues regarding consent, bodily integrity, labelling and reintegration which are particularly pertinent and controversial regarding minors.² In the context of unconvicted adults, the non-consensual collection of genetic material encroaches on the right to bodily integrity especially, while the subsequent storage of DNA arguably affects the right to privacy as well as the presumption of innocence. The expansion of laws regarding non-conviction³ DNA collection and retention in many jurisdictions may be explained by broad trends away from a rights-oriented paradigm towards a more populist and punitive model, by the emphasis in political discourse and practice on the need to avert risk, and the desire to “rebalance” the criminal justice system in favour of the victim and the wider community. However, the competing demands that relate to criminal justice have been resolved differently when it comes to DNA collection and retention, thereby rendering some countries’ schemes more problematic in terms of human rights than others.

After describing the implications for criminal justice of DNA in a broad sense, the article will consider a number of key precepts which may be affected by DNA collection and subsequent retention, namely the right to bodily integrity, the right of privacy and the presumption of innocence. It will focus on how existing laws in a range of common law jurisdictions have sought to address these concerns.

¹ See Liz Campbell, ‘A rights-based analysis of DNA retention: “Non-conviction” databases and the liberal state’ [2010] Crim.L.R. 889.

² See Liz Campbell and Nessa Lynch, ‘Competing paradigms? The use of DNA in youth justice in New Zealand and Scotland’, staff seminar, Victoria University of Wellington, New Zealand, December 2010.

³ The term “non-conviction” DNA retention is used throughout this piece as shorthand for storage of DNA which is not dependent on a criminal conviction and occurs regardless of the results of a criminal investigation or prosecution. The only viable alternative term, “pre-conviction”, may suggest that a conviction does indeed follow, which is not the case.

Throughout, the extent to which these comparator countries have influenced each other, in terms of policy adoption or avoidance, will be noted. Crime control measures in the United States often represent a prototype for other countries, in terms of the usual trend and direction of policy transfer.⁴ However, rather than the “American exceptionalism” so often cited in criminological literature,⁵ until recently England and Wales has stood as somewhat of an anomaly in regards to DNA surveillance with the most expansive scheme of DNA retention for innocent persons in the common law world. Notably, this is now to be amended. The shared theme evident in the comparator jurisdictions is a shift to a risk-oriented model of DNA in criminal justice, although the Canadian approach appears most cognisant of the human rights implications of the expansion of DNA databases.

II. THE USE OF DNA IN CRIMINAL INVESTIGATIONS

The genetic material in human DNA determines physical characteristics and traits, genetic disorders, susceptibility to disease and ethnic origin. An individual’s DNA is unique (except in the case of identical twins) and is inherited from both one’s parents. As more similarities may be seen in the DNA of siblings and family members when compared with unrelated persons, DNA may reveal familial relationships. Thus, a DNA sample contains a range of intimate personal and family information. In contrast, a DNA profile, generated from a sample, is a code comprising a set of identifying characteristics from regions of DNA that are not known to provide for any physical characteristics or medical conditions of the person. A DNA profile consists of a list of numbers based on specific areas of DNA known as short tandem repeats and a gender indicator, and thus may only be read and interpreted with the aid of technology.⁶ While profiles are computerised, they still contain “substantial amounts of unique personal data”,⁷ including information about familial relationships and ethnic origin.

⁴ Trevor Jones and Tim Newburn, ‘Learning from Uncle Sam? Understanding US Influences over UK Crime Control Policy’ (2002) 15(1) Governance 97; Tim Newburn, ‘Atlantic crossings: “Policy transfer” and crime control in the USA and Britain’ (2002) 4 Punishment and Society 165.

⁵ See for example Trevor Jones and Tim Newburn, *Policy Transfer and Criminal Justice: Exploring US Influence over British Crime Control Policy* (Open University Press 2007), 5.

⁶ Parliamentary Office of Science and Technology, *Postnote: The National DNA Database*, Number 258 (2006) <<http://www.parliament.uk/documents/post/postpn258.pdf>> accessed May 2, 2011.

⁷ *S. v. U.K.*, 48 E.H.R.R. 1169 (Grand Chamber of the European Court of Human Rights), [73]-[76].

Many misconceptions exist about DNA evidence, insofar as it is often viewed as infallible and beyond question. However, as with other forms of physical evidence, the potential for false positives exists. The profiling system used in the United Kingdom uses ten regions of DNA whereas a previous system used six; in Australia nine loci are used; in the United States and Canada 13 are used and in New Zealand 15.⁸ Thus, an “adventitious match” could occur between two DNA profiles, and this becomes more likely the fewer loci are used; although it has been argued that further testing of additional DNA loci would distinguish between two such individuals’ DNA, except in the case of identical twins.⁹ Moreover, contamination could occur at the time the swab was taken, or during comparison in the laboratory. Furthermore, human error in storage, processing or interpretation is always possible, as in the context of other evidence. It is also conceivable for a positive match to be found between crime scene material and a suspect’s DNA without necessarily implying criminal culpability, either by virtue of innocent presence at a particular location or through the “planting” of evidence. Finally, despite popular media portrayal, not all crime scenes are swabbed for genetic material due to logistical, practical or financial reasons, and so comparison with database profiles is not always part of an investigation.

III. DNA DATABASES

Despite points of commonality, and evidence of a degree of convergence, some notable differences persist between current laws on non-conviction DNA databases in a range of common law countries. England and Wales may be characterised as occupying one end of the spectrum insofar as its policies until 2011 were the most permissive, while Canada maintains the most restrictive laws.

The United Kingdom’s National DNA Database (NDNAD) was set up in 1995 and contains genetic material gathered from all over

⁸ Parliamentary Office of Science and Technology (n.6), 1; New South Wales Centre for Genetics Education, ‘Fact Sheet 22: DNA Genetic Testing – Paternity and Forensic Use’ <http://www.genetics.com.au/factsheet/fs22.asp#para_2> accessed May 2, 2011; Federal Bureau of Investigation, ‘Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System’ <<http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet>> accessed May 2, 2011; Standing Committee on Public Safety and National Security, House of Commons Canada, *Statutory Review of the DNA Identification Act*, June 2009 (40th Parliament, 2nd Session), 2; Institute of Environmental Science and Research, *A brief history of Forensic DNA 1990-2010* <<http://www.esr.cri.nz/SiteCollectionDocuments/ESR/PDF/ForensicScience/Forensic20yearsDNA.pdf>> accessed May 2, 2011.

⁹ National DNA Database Strategy Board, *National DNA Database Annual Report 2007-09* (NOIA 2009), 42.

the UK. Proportionately speaking the NDNAD is the largest of its kind in the world and contained 7.39 per cent of the UK population in 2009,¹⁰ while the most recent figures indicate almost nine per cent coverage.¹¹ Second chronologically only to the United Kingdom, a DNA database was established in New Zealand in 1995, and this was followed at federal level in the United States with establishment of the Combined DNA Index System (CODIS) and the National DNA Index System (NDIS) in 1998.¹² Canada's National DNA Data Bank has been in place since 2000,¹³ and the National Criminal Investigation DNA Database (NCIDD) was constructed in Australia in 2001.¹⁴ Though the value of DNA in criminal investigations is not disputed, policies relating to the parameters of these databases and the duration of DNA storage are in flux.

IV. THE COLLECTION OF DNA

While collection of genetic material on the one hand and retention on the other overlap in respect of their consequences they raise slightly different issues. Collecting DNA from an individual encroaches on his right to physical integrity,¹⁵ by virtue of the seizure of his bodily material through an invasive procedure, and given that force may be used to obtain the sample if consent is not forthcoming.¹⁶ The degree of intrusion on the right to physical integrity, as protected through provisions relating to privacy or prohibiting unreasonable

¹⁰ Constitution Committee, *Surveillance: Citizens and the State* (HL 2008-09, 18-I), para. 180.

¹¹ National Policing Improvement Agency, 'National DNA Database – Statistics' <<http://www.nipa.police.uk/en/13338.htm>> accessed May 2, 2011.

¹² Federal Bureau of Investigation (n.8).

¹³ *DNA Identification Act* 1998, amending the *Criminal Code of Canada*. See Sylvain Lalonde, 'Canada's National DNA Data Bank: A Success Story' (2006) 39 Canadian Society of Forensic Science Journal 1.

¹⁴ See David Whiley and Barbara Hocking, 'DNA: Crime, Law and Public Policy' [2003] University of Notre Dame Australia Law Review 4; (2003) 5 University of Notre Dame Australia Law Review 37; Jeremy Gans and Gregor Urbas, 'DNA Identification in the Criminal Justice System', in *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology 2002) No. 226; Simon Walsh, Oliver Ribaux, John Buckleton, Alastair Ross and Claude Roux, 'DNA profiling and criminal justice: a contribution to a changing debate' (2004) 36 Australian Journal of Forensic Sciences 34.

¹⁵ Though the privilege against self-incrimination may appear relevant in this context, case law has excluded tangible evidence decisively from its scope: *Saunders v. U.K.*, 23 E.H.R.R. 313, [69] (European Court of Human Rights); *Schmerber v. California*, 384 U.S. 757 (1966), 761; *R. v. S.A.B.* [2003] SCC 60, [2003] 2 S.C.R. 678. See Jeremy Gans, 'Something to Hide: DNA, surveillance and self-incrimination' (2001) Current Issues in Criminal Justice 168.

¹⁶ See text accompanying n.42, *post*.

searches,¹⁷ is affected by the stage at which sampling occurs, the threshold for the offence and the means of sampling. Key differences exist between common law countries in terms of the populations from whom DNA samples may be taken, ranging from anyone arrested, through persons arrested for certain offences of a minimum gravity, or after the issue of a warrant in specific instances. In addition, the method by which DNA is collected, that is whether through a blood sample or buccal swab, may also determine the impact on human rights.

A. The population of the databases

In the United Kingdom, the United States and now New Zealand, the police may collect DNA without judicial approval from a wide range of suspects. In England, Wales and Northern Ireland a DNA sample may be taken from any individual arrested for or informed that he will be reported for a recordable offence,¹⁸ whether or not he is detained in a police station or in police custody.¹⁹ The equivalent Scottish measures are slightly narrower: a bodily sample may be collected from a person detained or arrested for an offence punishable by imprisonment.²⁰ Since the enactment of the *DNA Fingerprinting Act* of 2005,²¹ DNA sample collection has been required by United States' agencies "from individuals who are arrested or from non-United States persons who are detained under the authority of the United States".²² In addition, a sizeable minority of American states now have laws authorising arrestee DNA sampling, although this pertains to felonies or offences punishable by a minimum period of imprisonment only.²³ The *Criminal Investigations (Bodily Samples)*

¹⁷ European Convention on Human Rights, Art. 8; Fourth Amendment to the US Constitution; *Canadian Charter of Rights*, ss.7 and 8; and *New Zealand Bill of Rights Act* 1990, s.21.

¹⁸ A recordable offence is one which carries the possibility of a custodial sentence as well as other, non-imprisonable offences in the schedule to the *National Police Records (Recordable Offences) Regulations* 2000 (S.I. 2000 No. 1139).

¹⁹ *Police and Criminal Evidence Act* 1984 and the *Police and Criminal Evidence (Northern Ireland) Order* 1989 (S.I. 1989 No. 1341), as amended by the *Criminal Justice and Police Act* 2001 and the *Criminal Justice Act* 2003.

²⁰ *Criminal Procedure (Scotland) Act* 1995, s.18. For further analysis of the Scottish scheme, see Paul Johnson and Robin Williams, 'DNA and Criminal Investigation: Scotland and the "UK National DNA Database"' (2004) *Scottish Journal of Criminal Justice Studies* 10; and Liz Campbell, 'DNA Databases and Innocent Persons: Lessons From Scotland?' (2010) 4 *Juridical Review* 285.

²¹ Passed as Title X of the *Violence Against Women and Department of Justice Reauthorization Act* 2005, Public Law 109-162, 119 Stat. 2960.

²² *ibid*, 3085 (s.1004(a)(1)).

²³ Alaska, Arizona, California, Kansas, Louisiana, Maryland, Michigan, Minnesota, New Mexico, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Vermont and Virginia have laws authorising arrestee DNA sampling. See the

Amendment Act 2009 in New Zealand changes the time at which the person's DNA can be acquired compulsorily to arrest (rather than after conviction as was previously the case), it removes the need for judicial authorisation before the taking of a sample, and lowers the offence threshold considerably. Once the 2009 Act is implemented fully, police will be able to collect DNA from persons suspected of having committed an imprisonable offence or another offence listed in the Act's schedule (such as assault, receiving stolen goods, or peeping into a dwelling).²⁴

This outline indicates that many common law countries are increasing gradually the scope and populations of DNA databases, by permitting collection at arrest or charge, rather than it being predicated on conviction as was once the case. Moreover, judicial approval is not required in the United Kingdom, United States or New Zealand. However Canada and Australia differ somewhat from the other comparator jurisdictions, in limiting collection to indictable offences and in requiring a warrant for DNA collection in certain instances. In Australia, the *Crimes Act* 1914 (as amended) permits the collection of a forensic sample from a person suspected of having committed an indictable offence, or charged with or summonsed to appear before a court in relation to an indictable offence.²⁵ If the suspect is in custody, a senior constable may authorise non-intimate sampling, but a court order is required for intimate procedures.²⁶ If the individual is not in custody sample collection must be based on a court order. Furthermore, Canada has even more strongly resisted automatic non-conviction DNA collection and retention by police. Collection may occur only with a court warrant and in relation to a suspected indictable offence, if the best interests of the administration of justice necessitate a comparison between that person's DNA and material found at a crime scene.²⁷ Thus, while DNA testing and banking in Canada has been described as symptomatic of a trend in criminal justice away from an emphasis on individual rights towards increased state control,²⁸ in fact Canada retains one of the more

website of the National Conference of State Legislatures: <<http://www.ncsl.org/IssuesResearch/CivilandCriminalJustice/StateLawsonDNADataBanks/tabcid/12737/Default.aspx>> accessed May 2, 2011.

²⁴ Pt 2B, inserting s.24J into the *Criminal Investigations (Bodily Samples) Act* 1995.

²⁵ See Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* [2003] A.L.R.C. 96. See also David Ormerod and Andrew Roberts, 'DNA sampling and database – Australia' [2005] Crim.L.R. 330.

²⁶ S.23WC.

²⁷ S.487.05.

²⁸ Neil Gerlach, *The Genetic Imaginary: DNA in the Canadian Criminal Justice System* (University of Toronto Press 2004) 219.

limited schemes,²⁹ despite pressure from opposition political parties at the time the *DNA Identification Act* 1998 was being debated.³⁰ In its 2009 review of the relevant legislation, the Standing Committee on Public Safety and National Security recommended the automatic taking of a DNA sample upon conviction for all designated offences, but did not address systematic non-conviction DNA collection or retention.³¹ Indeed, the Canadian government is now proposing to expand the scheme by taking DNA from any individual charged with an indictable offence,³² demonstrating a possible shift to a model more akin to other common law jurisdictions.

The compelling interest in DNA as a law enforcement tool and its importance in the detection of crime is stressed in many common law courts,³³ although in *S. v. United Kingdom*, the Grand Chamber of the European Court of Human Rights noted that most states allow such materials to be taken only from individuals suspected of having committed offences of a certain minimum gravity.³⁴ This approach is particularly evident in the United States and in Canada, while in New Zealand, the range of offences is being extended. The rationale for this is that the need to investigate more serious criminality warrants certain special measures, and conversely that bodily intrusions should not occur in relation to minor offences. Maintaining a threshold in this way so that DNA collection pertains to crimes of a certain gravity only limits the population of the database, and thus may be seen as proportionate. However, it is not apparent that the more serious the suspected offence the more we should permit limitations on the individual's rights pre-trial.³⁵ Either a crime control tactic is permissible or not in a rights' sense, and the apparent severity of the crime should not be of consequence.

²⁹ See Julianne Parfett, 'Canada's DNA Databank: Public Safety and Private Costs' (2002-2003) 29 *Manitoba Law Journal* 33.

³⁰ Janet Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press 2002) 128.

³¹ Standing Committee on Public Safety and National Security (n.8), Recommendation 3.

³² Canadian Civil Liberties Association (CCLA), 'CCLA Concerned about Potential Expansion of DNA Databank' (May 14, 2010) <<http://ccla.org/2010/05/14/ccla-concerned-about-potential-expansion-of-dna-databank/>> accessed May 2, 2011.

³³ *U.S. v. Kincaide*, 379 F.3d 813 (9th Cir. 2004) (*en banc*); *Anderson v. Virginia*, 650 S.E.2d 702 (Vir. 2006), 706; *U.S. v. Pool*, 645 F. Supp. 2d 903 (2009), 912; *Haskell and Ento v. Brown*, 677 F. Supp. 2d 1187 (2009).

³⁴ *S. v. U.K.* (n.7), [106]-[108].

³⁵ Andrew Ashworth, *Serious Crime, Human Rights and Criminal Procedure* (Sweet and Maxwell 2002).

B. The method of DNA collection

In addition to the populations from whom DNA may be taken, the mechanism by which this occurs is also significant. In the United Kingdom, DNA is taken by police by means of a buccal (mouth) swab which is classified as a non-intimate sample and does not require consent,³⁶ in contrast to the characterisation in Australia of such a swab as intimate which must be taken by a medical practitioner or another “appropriately qualified” person.³⁷ In Canada and the United States, DNA is generally collected by means of a blood sample, while in New Zealand a *bodily sample* means either a blood or a buccal sample, although most profiles on the databank come from buccal scrapes.³⁸ In *Schmerber v. California* the United States Supreme Court emphasised that a compulsory blood test after arrest for driving while intoxicated was reasonable given the minimal extraction of blood, its effectiveness and widespread use, the virtual absence of risk or pain for most people, and its performance by a physician in a hospital environment.³⁹ Despite the absence of a specific Supreme Court case in point, for the most part, a Fourth Amendment analysis using a general balancing test has been applied in state and federal courts to uphold the collection of DNA samples from persons arrested for violent felonies on the basis that it entails a minimal privacy intrusion, and because of the diminished expectation of privacy of arrestees when compared with the general population and the compelling interest in DNA as a law enforcement tool.⁴⁰ Similarly, in *R. v. Rodgers* the Supreme Court of Canada found that the taking of a DNA sample by blood involves a “minimal” “impact on the physical integrity of the targeted offenders”.⁴¹

If the person refuses to consent to bodily sampling, reasonable force may be used,⁴² although in Canada any “necessary” force may be used to take the sample,⁴³ and the blood sample need not be taken by a medical physician. Walker and Cram have stated that “the prospect of force being used by the police to keep a suspect still and to hold his lips open whilst his mouth lining is scraped does seem to

³⁶ *Criminal Justice and Public Order Act 1994*, s.58; *Criminal Procedure (Scotland) Act 1995*, s.18(6A).

³⁷ *Crimes Act 1914*, s.23WA.

³⁸ Institute of Environmental Science and Research (n.8), 7.

³⁹ *Schmerber v. California*, 384 U.S. 757 (1966), 771.

⁴⁰ See n.33.

⁴¹ *R. v. Rodgers* [2006] 1 S.C.R. 554 (Supreme Court of Canada). See Andrew Roberts, ‘Case Comment: DNA database – Canada’ [2006] Crim.L.R. 866.

⁴² *Crimes Act 1914*, s.23XJ (Australia); *Criminal Investigations (Bodily Samples) Amendment Act 2009*, s.48A (New Zealand); *Police and Criminal Evidence Act 1984*, s.117 (England and Wales); *Criminal Procedure (Scotland) Act 1995*, s.19B.

⁴³ *Criminal Code of Canada*, s.487.07.

be an extremely intrusive search".⁴⁴ However, the limited enduring effect on the individual and the usefulness for criminal investigation indicate scraping the side of someone's mouth for DNA collection is justifiable, as is the taking of a blood sample, as long as it is predicated on reasonable suspicion which is judicially approved, as in the case of Canada, and as long as only reasonable force is used, as in the United Kingdom. In this respect Redmayne's view of Walker and Cram's approach as unduly rigid seems persuasive, on the basis that it would lead to a loss of useful evidence and also that notions of bodily integrity and what constitutes acceptable investigative practice are not static.⁴⁵ Indeed, in New Zealand, if consent to taking bodily material is not forthcoming and thus if force is needed to be used, a fingerprick blood sample must be taken rather than a buccal swab,⁴⁶ indicating some divergence in terms of political and legal perceptions of physical intrusions, given the legislative preference for the latter in non-consensual situations in the United Kingdom.

The diminished expectation of privacy of arrestees when compared with the general population has been focused on in United States case law in particular in finding DNA collection to be constitutional.⁴⁷ The rights of the arrested or accused person are affected through searches, seizures and detention, although pre-trial, the state must provide reasonable grounds for suspecting involvement in a particular crime before limiting such rights. These accepted incursions are of comparable impact to the forcible scraping of the inside of the suspect's mouth or the taking of a blood sample, which is and should be permissible as long as grounded upon reasonable suspicion.

C. *Warrant requirements*

Many of the comparator jurisdictions permit DNA collection to be predicated on arrest and police discretion. However, the warrant requirement in Canada for any DNA collection is preferable because of the express articulation of reasonable suspicion and judicial involvement. Judicial approval of a warrant protects the DNA collection process from abuse, given the independent examination of police suspicions and reasoning which underpin the request for a bodily sample. Limiting the power to authorise DNA collection to judges ensures that an adequate detachment is maintained between

⁴⁴ Ian G. Cram and Clive Walker, 'D.N.A. profiling and police powers' [1990] Crim.L.R. 479, 486-7.

⁴⁵ Mike Redmayne, 'The DNA database: civil liberty and evidentiary issues' [1998] Crim.L.R. 437, 443.

⁴⁶ *Criminal Investigations (Bodily Samples) Amendment Act 2009*, s.48A.

⁴⁷ See n.33.

the investigating body and the appraiser of reasonable suspicion on which DNA collection is predicated.

Arrest must be based on reasonable suspicion, that is, an “articulable and particularised belief that criminal activity is afoot”⁴⁸ which has “an objective basis … based on facts, information, and/or intelligence” and “can never be supported on the basis of personal factors”.⁴⁹ However, arrest practices by the police may be discriminatory or premised on incorrect information or unjustifiable concerns.⁵⁰ Indeed, it was reported that in England and Wales “arrest for DNA sampling” has occurred,⁵¹ although this has been denied by the Association of Chief Police Officers.⁵² Regardless of the veracity of such claims, the interference involved in bodily sampling and the sensitivity of the data in DNA implies that collection should be strictly limited to cases where reasonable suspicion is established firmly in a court setting. Though the impact of a mouth swab or blood test on bodily integrity seems proportionate to the aim of crime control, permitting this to occur systematically upon arrest rather than at charge is dubious. Thus, as outlined, the Canadian approach in this context is preferable, given that express articulation of reasonable suspicion and judicial approval is required. Indeed, in *R. v. Briggs* the Ontario Court of Appeal found that the “best interests of the administration of justice” standard which needs to be satisfied before DNA collection and comparison could occur was constitutional as it requires the court to consider and balance privacy interests against the societal aim of crime control.⁵³

In essence, it does not appear that there is robust normative opposition to the taking of DNA, as long as judicial approval is granted. What appears more problematic in a rights’ sense is the effect of DNA retention on the right to privacy and on the presumption of innocence.

⁴⁸ *Ornelas v. United States*, 517 U.S. 690 (1996), 695.

⁴⁹ Home Office, *Police And Criminal Evidence Act 1984, Code A: Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search; Police Officers and Police Staff of Requirements to Record Public Encounters* (London 2011), para. 2.2.

⁵⁰ Nuffield Council on Bioethics, *The Forensic Use of Bioinformation: Ethical Issues* (London 2007), para. 4.23.

⁵¹ Human Genetics Commission, *Nothing to Hide, Nothing to Fear?* (Department of Health 2009), para. 1.19.

⁵² See Association of Chief Police Officers, ‘Press Release’ <http://www.acpo.police.uk/pressrelease.asp?PR_GUID={C24A0DF6-B7AA-4B5A-979B-27FD52310EA3}>> accessed May 2, 2011; see also BBC, ‘Police making arrests “just to gather DNA samples”’ <<http://news.bbc.co.uk/1/hi/uk/8375567.stm>> accessed May 2, 2011.

⁵³ *R. v. Briggs* (2001) 157 C.C.C. (3d) 38.

V. DNA RETENTION AND THE RIGHT TO PRIVACY

The right to privacy is that most often cited in relation to DNA retention,⁵⁴ given the exceptional nature of genetic material which determines physical characteristics and traits, genetic disorders, susceptibility to disease and ethnic origin. While the storage and use of a DNA profile rather than a DNA sample may mitigate the impact on personal privacy, both forms affect the right to informational privacy, which is the right to retain control or at least oversight of data or material taken from or relating to oneself. The effect of DNA retention on privacy has been judged partly by the categories of people whose DNA may be retained, the duration of retention and the form in which DNA is stored. Keeping the genetic material of convicted persons has been approved by numerous common law courts,⁵⁵ but the situation concerning unconvicted persons is less clear.

A. Duration of retention

Until the *Protection of Freedoms Bill* 2011 is enacted, indefinite retention of DNA may occur in England, Wales and Northern Ireland after genetic material is collected upon arrest, regardless of whether the individual is charged or prosecuted or not.⁵⁶ Such retention must have been for the purposes of the prevention and detection of crime; the investigation of an offence; or the conduct of a prosecution. When challenged, the European Court of Human Rights found in *S. v. United Kingdom* that this “blanket and indiscriminate” retention of DNA violated the right to privacy and family life under Article 8 of

⁵⁴ Andrew Roberts and Nick Taylor, ‘Privacy and the DNA database’ (2005) European Human Rights Law Review 381.

⁵⁵ *Jones v. Murray* 962 F.2D 302 (4th Cir. 1992); *U.S. v. Kimler* 335 F.3D 1132 (10th Cir. 2003); *Groce man v. U.S. Department Of Justice*, 354 F.3D 411 (5th Cir. 2004); *Green v. Berge*, 354 F.3D 675 (7th Cir. 2004); *U.S. v. Kincaide*, 379 F.3D 813 (9th Cir. 2004), cert. denied 544 U.S. 924 (2005); *Nicholas v. Goord*, 430 F.3D 652 (2d Cir. 2005); *U.S. v. Szubelek*, 402 F.3D 175 (3rd Cir. 2005); *Padgett v. Donald*, 401 F.3D 1273 (11th Cir. 2005), cert. denied 546 U.S. 820, (2005); *Wilson v. Collins*, 517 F.3D 421 (6th Cir. 2006); *U.S. v. Conley*, 453 F.3D 674 (6th Cir. 2006); *U.S. v. Hook*, 471 F.3d 766 (7th Cir. 2006); *U.S. v. Kraklio*, 451 F.3D 922 (8th Cir. 2006); *U.S. v. Weikert*, 504 F.3D 1 (1st Cir. 2007); *U.S. v. Amerson*, 483 F.3D 73 (2d Cir. 2007); *U.S. v. Kriesel*, 508 F.3D 941 (9th Cir. 2007); *U.S. v. Banks*, 490 F.3D 1178 (10th Cir. 2007); *R. v. S.A.B.* [2003] SCC 60, [2003] 2 S.C.R. 678. See also *Van Der Velden v. The Netherlands*, App. no. 29514/05 (European Court of Human Rights, December 7, 2006); *W. v. The Netherlands*, App. no. 20689/08 (European Court of Human Rights, January 20, 2009).

⁵⁶ *Police and Criminal Evidence Act* 1984, s.64(1A); *Police and Criminal Evidence (Northern Ireland) Order* 1989 (S.I. 1989 No. 1341), as amended by the *Criminal Justice and Police Act* 2001.

the European Convention on Human Rights,⁵⁷ and thus a more restrictive model is currently being debated in the *Protection of Freedoms Bill*. The bill, as it stands at the time of writing (May 2011), permits non-conviction DNA retention for three years in the case of arrest for certain serious offences.⁵⁸ This may be extended for two years on application to a magistrates’ court, with an appeal against this decision being permitted to the Crown Court.⁵⁹ Although material may be retained pending investigation or proceedings, it must be deleted after acquittal or discontinuance of proceedings for minor offences.⁶⁰

In contrast to the scheme impugned in *S. v. United Kingdom*, specific time frames are provided in Scotland, Australia and New Zealand, and will soon be in England and Wales. Retention of genetic samples is permitted in Scotland only where there has been a prosecution, and only in relation to certain sexual or violent allegations,⁶¹ and this found favour in the European Court.⁶² In other words, retention is permitted if proceedings have been instituted rather than after arrest or charge, and this applies to a limited range of more serious offences. Indefinite retention of DNA without conviction is not allowed *per se*; according to the *Criminal Procedure (Scotland) Act* 1995 the destruction date is three years following the conclusion of proceedings and a sheriff may extend this for no more than two years,⁶³ and nothing prevents recurring police applications to amend further this date. In Australia, the material must be destroyed as soon as practicable after 12 months from the taking of the sample if proceedings have not been instituted or have been discontinued, or if the person has been acquitted and no appeal is lodged or the appeal is withdrawn, unless there is an outstanding arrest warrant for the person from whom the sample was taken.⁶⁴ Once such a warrant lapses the material must be destroyed, or if the person is apprehended destruction must occur within 12 months.⁶⁵ Furthermore, on application by a constable or the Director of Public Prosecutions, a magistrate may extend retention for 12 months if there are special reasons for doing so, and such an extension may be

⁵⁷ *S. v. U.K.* (n.7), [119].

⁵⁸ *Police and Criminal Evidence Act* 1984, s.63F, as inserted by the *Protection of Freedoms Bill* 2011.

⁵⁹ *ibid.*

⁶⁰ *ibid.*, s.63E, as inserted by the *Protection of Freedoms Bill* 2011.

⁶¹ *Criminal Procedure (Scotland) Act* 1995, s.18A, as inserted by the *Police, Public Order and Criminal Justice (Scotland) Act* 2006. The list of these is contained in s.19A6.

⁶² *S. v. U.K.* (n.7), [109], [110].

⁶³ Ss.18A(4) and (5).

⁶⁴ *Crimes Act* 1914, s.23YD.

⁶⁵ *Crimes Act* 1914, s.23YD(4).

given more than once.⁶⁶ In New Zealand, a sample must be destroyed as soon as practicable after a DNA profile is obtained from it, and records of analysis must be destroyed as soon as practicable within two months of taking the sample, if the person is not charged, if the charge is withdrawn or the person is acquitted.⁶⁷ A district court judge may extend this on police application by increments of six months if good reason remains to suspect the person of committing a relevant offence or if retention of the samples and records is important to the investigation or to related criminal proceedings.⁶⁸

Under the *Canadian Criminal Code*, bodily substances taken under warrant will be destroyed “without delay” if a match is not found between the suspect’s DNA and the material from the crime scene or if the person is finally acquitted, or will be destroyed within a year if proceedings are discontinued.⁶⁹ An exception may be made to this by order of a provincial court judge if the bodily substances or results might reasonably be required in an investigation or prosecution of the suspect or of someone else in relation to the suspected offence.⁷⁰ In essence, the judge in this instance determines the appropriate retention period. The Canadian government is now proposing to expand this scheme, to facilitate retention after an acquittal or failure to proceed with a charge.⁷¹ In the United States, the *DNA Fingerprinting Act* 2005 does not provide specific retention periods, but states that destruction occurs on receipt of a court order certifying that the charge has been dismissed or resulted in an acquittal, or that no charge was filed.⁷² Other than this, there are no rules relating to DNA retention at the United States federal level.

Indefinite retention of DNA is problematic in terms of human rights; the European Court of Human Rights held that “blanket and indiscriminate” retention of DNA in England and Wales violated the right to a private and family life,⁷³ and favoured limiting non-conviction retention to serious suspected offences.⁷⁴ As noted above, DNA contains a range of intimate personal and family information, and thus retention engages and affects the right to privacy. This is compounded by the fact that the original decision

⁶⁶ *Crimes Act* 1914, s.23YD(5) and (7).

⁶⁷ *Criminal Investigations (Bodily Samples) Amendment Act* 2009, s.60A.

⁶⁸ *ibid.*, s.61(3A).

⁶⁹ *Criminal Code of Canada*, s.487.09.

⁷⁰ *Criminal Code of Canada*, s.487.09(2).

⁷¹ CCLA (n.32).

⁷² *DNA Fingerprinting Act* 2005 (n.21), 3084-5 (s.1002(2)).

⁷³ *S. v. U.K.* (n.7), [119]. For analysis see Kate Beattie, ‘*S and Marper v. UK: privacy, DNA and crime prevention*’ (2009) European Human Rights Law Review 229; Liz Heffernan, ‘DNA and fingerprint data retention: *S and Marper v. United Kingdom*’ (2009) 3 European Law Review 491.

⁷⁴ *S. v. U.K.* (n.7), [109]-[110].

about inclusion on the databases may be purely a police matter. While initially retention in Scotland is contingent on police judgment,⁷⁵ the approval of a sheriff is required for extension of the time frame for unconvicted persons,⁷⁶ and judicial approval will similarly be required in England, Wales and Northern Ireland.⁷⁷ In Canada, a warrant is required before collection and a judge determines the retention period; in Australia, retention beyond a year requires judicial approval, while in New Zealand a district court judge must order retention at six monthly intervals. This judicial intervention is preferable to the police process in place in England and Wales until 2011, as it ensures proper judicial oversight and thus seeks to protect individuals from unjustified state intrusion into genetic privacy. Indeed, central to the decision of the United States District Court in *United States v. Pool* in balancing the competing interests was the “judicial involvement” and grand jury determination of probable cause before DNA testing.⁷⁸

B. Form of DNA storage

Whether DNA is held as a sample or profile may also be relevant for privacy concerns.⁷⁹ As previously detailed, a wider range of intimate genetic information may be gleaned from the former, while a DNA profile is a set of identifying characteristics from areas of DNA that do not reveal a person’s physical traits or medical conditions. Moreover, a DNA profile is held as a code which may only be read with the aid of technology.⁸⁰ Of the comparator jurisdictions focused on here, until 2011 only New Zealand clearly distinguished between the two formats, and requires the destruction of a sample as soon as practicable after a DNA profile is obtained from it.⁸¹ Under the *Protection of Freedoms Bill*, England, Wales and Northern Ireland will require destruction of a DNA sample as soon as a DNA profile has been derived from the sample, or within six months, if this is sooner.⁸² Though these policies limit the amount of information

⁷⁵ *Criminal Procedure (Scotland) Act* 1995, s.18.

⁷⁶ S.18A(5).

⁷⁷ *Protection of Freedoms Bill* 2011, cl.3 (inserting s.63F into the *Police and Criminal Evidence Act* 1984).

⁷⁸ *U.S. v. Pool*, 645 F. Supp. 2d 903 (2009), 909-912.

⁷⁹ See Barbara Prainsack, ‘Key Issues in DNA Profiling and Databasing: Implications for Governance’ in Richard Hindmarsh and Barbara Prainsack (eds) *Genetic Suspects: Global Governance of Forensic DNA Profiling and Databasing* (Cambridge University Press 2010), chaps 2, 26 and 27.

⁸⁰ Parliamentary Office of Science and Technology (n.6).

⁸¹ *Criminal Investigations (Bodily Samples) Amendment Act* 2009, s.60A.

⁸² *Protection of Freedoms Bill* 2011, cl.14 (inserting s.63Q into the *Police and Criminal Evidence Act* 1984).

which may be obtained, the right to privacy is still affected by profiles' retention, given the "substantial amounts of unique personal data" contained in them, including information about familial relationships and ethnic origin.⁸³ In other words, storage as a profile may mitigate but not resolve completely concerns about privacy.

VI. DNA RETENTION AND THE PRESUMPTION OF INNOCENCE

A further right or interest which is affected by the retention of the DNA of unconvicted persons is the presumption of innocence. Non-conviction DNA databases embody the state's suspicion of the risk of (re-)offending on the part of certain people, thereby distinguishing them from "truly" innocent people who have never come to the attention of the police. In broad terms, this may compromise the precept that everyone should be presumed innocent, by keeping the DNA of legally innocent individuals on a database which is otherwise populated by convicted persons. While the schemes in place in the United Kingdom, the United States and Canada narrow the range of relevant unconvicted persons, this does not mitigate the effect on those who remain included in the database.

In *S. v. U.K.*, the applicants claimed that retention casts suspicion on unconvicted persons implying that they were not "wholly innocent".⁸⁴ While the European Court of Human Rights concurred, stating that unconvicted persons, who "are entitled to the presumption of innocence, are treated in the same way as convicted persons",⁸⁵ this factor underpinned its final judgment on the right to privacy rather than representing a discrete finding on the substantive point. Similarly, little attention has been paid in the United States to the presumption of innocence *per se* in relation to DNA databases. In *United States v. Pool*, when dismissing the claim that DNA collection breaches procedural due process as protected by the Fifth Amendment, the District Court for the Eastern District of California noted that the DNA destruction procedures after exoneration or dismissal of charges ensure that "the risk of an innocent person's DNA being included in CODIS [the US federal DNA database] is minimal".⁸⁶ However, in *United States v. Mitchell* the court granted the defendant's motion opposing the collection of a pre-trial DNA sample,⁸⁷ stressing the neglect in *United States v. Pool* of "the moral polestar of our criminal justice system – the presumption of

⁸³ *S. v. U.K.* (n.7), [73]-[76].

⁸⁴ *ibid.*, [89].

⁸⁵ *ibid.*, [122].

⁸⁶ *U.S. v. Pool*, 645 F. Supp. 2d 903 (2009), 915.

⁸⁷ *U.S. v. Mitchell*, 681 F. Supp. 2d 597 (2009).

innocence”.⁸⁸ However, this reference to the presumption, as in *S. v. U.K.*, was inextricably bound up with the right to privacy, and concerned collection and the storage that follows rather than retention specifically. In the United States, however, the presumption of innocence is simply a rule of evidence which allows the defendant to stand mute at trial and places the burden upon the state to prove the charge against him beyond a reasonable doubt.⁸⁹ Thus, despite the instinctive feeling that DNA retention affects a person’s right to be presumed innocent, the presumption as legally construed is not in fact compromised in the United States. The same holds true for New Zealand.

In the United Kingdom, the maintenance of formalised suspicion in the form of DNA retention may pose problems in a rights’ sense, given that, unlike the situation in the United States, the presumption of innocence in the jurisprudence of the European Court of Human Rights extends beyond a strictly procedural guarantee to encompass a “reputational” aspect which aims to protect the image of the person.⁹⁰ As Trechsel notes, complex problems surround the application of this element of the presumption of innocence.⁹¹ Judicial decisions or reasoning reflecting an opinion that an acquitted person is guilty, such as requiring him to pay the costs of the proceedings or compensation or stating that had a prosecution not been time-barred it would “very probably have led to … conviction”, breach this aspect of Article 6(2).⁹² Moreover, where a court expresses suspicion about an acquitted individual (rather than opining that he is guilty), such as by refusing compensation to him or by saying that suspicion has not been “dispelled”, the presumption will also have been infringed.⁹³ However, “[t]he voicing of suspicions regarding an accused’s innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation.”⁹⁴ In other words, where criminal proceedings are discontinued, statements which describe a state of suspicion, as opposed to those which constitute a determination of guilt, are compatible with the presumption of innocence.⁹⁵ Non-conviction

⁸⁸ *ibid.*, 606.

⁸⁹ The Fifth Amendment to the U.S. Constitution (see John N. Mitchell, ‘Bail Reform and the Constitutionality of Pretrial Detention’ (1969) 55 Virginia Law Review 1223, 1231); *New Zealand Bill of Rights Act* 1990, s.25 (see *Hansen v. R.* [2007] NZSC 7).

⁹⁰ Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005), 164.

⁹¹ *ibid.*, 166.

⁹² *Minelli v. Switzerland*, 5 E.H.R.R. 554, [37]-[38].

⁹³ *Sekanina v. Austria*, 17 E.H.R.R. 221, [29]. Also see *Asan Rusbiti v. Austria*, App. no. 28389/95 (European Court of Human Rights, March 21, 2000).

⁹⁴ *Sekanina v. Austria*, *ibid.*, [30].

⁹⁵ *Nölkenbockhoff v. Germany*, 13 E.H.R.R. 360 (European Court of Human Rights); *Engert v. Germany*, 13 E.H.R.R. 392 (European Court of Human Rights), [37]-[39].

DNA retention is not an expression of guilt but arguably denotes suspicion on the part of the state as to the future criminality of the person and his likelihood of re-offending; in *S. v. U.K.*, the Grand Chamber stated that “the retention of the applicants’ private data cannot be equated with the voicing of suspicions”.⁹⁶ While this distinction is not explained or explored by the court, one can speculate that it is the absence of express articulation and dissemination of the fact of DNA retention which differentiates it from the voicing of suspicion. One could respond that DNA retention is on a continuum from the latter as it represents the state’s opinion about criminal tendencies on the part of the charged or acquitted person. If such an analogy is accepted and, despite the comment of the Grand Chamber, state storage of DNA is conceived of as representing a type of expression of suspicion, then the presumption of innocence in its reputational sense may be threatened.

In Canada, DNA profiles derived from bodily substances obtained from a suspect under warrant are not included in the national DNA data bank and are used only in the investigation and prosecution of a designated offence.⁹⁷ In other words, speculative searching is not permitted. This contrasts to the situation in the other comparator jurisdictions where the DNA of unconvicted and convicted persons is stored in the same repository and subject to the same searching mechanism. In the United States, the DNA database is subdivided into a Forensic Index of profiles deriving from crime scene samples, and an Offender and Arrestee Index.⁹⁸ New Zealand has two separate databases, the Crime Sample Database and the National DNA Database which contains profiles of individuals whether convicted or not,⁹⁹ while the Australian NCIDD and the United Kingdom’s NDNAD similarly contain both unconvicted and convicted parties’ DNA. The Canadian approach is a model of best practice by differentiating between the samples from convicted and arrested individuals, and by precluding exploratory comparisons of crime scene and stored samples. This distinction mitigates the potentially stigmatising effect of DNA retention and safeguards the presumption of innocence as protected by section 11(d) of the *Canadian Charter of Rights and Freedoms*.

An analogy may be drawn between DNA retention and pre-trial detention after the refusal of bail which also appears to equate an individual with convicted persons. Bail may be refused if there is,

⁹⁶ *S. v. U.K.* (n.7), [122].

⁹⁷ Department of Justice (Canada), ‘Criminal Code DNA Provisions’ <<http://www.justice.gc.ca/eng/cons/dna-adn/code.html>> accessed May 2, 2011.

⁹⁸ Federal Bureau of Investigation (n.8).

⁹⁹ Institute of Environmental Science and Research (n.8), 11.

inter alia, convincing evidence that pre-trial release could not assure the safety of any other person and the community, or to prevent the commission of an offence.¹⁰⁰ Indeed, Laudan notes that bail hearings cannot be squared with a broad construal of the presumption of innocence:¹⁰¹ thus if refusal of bail is permissible surely the less invasive retention of DNA must be too. Restrictions on the refusal of bail indicate what is appropriate in the context of DNA retention, given that in both instances the rights of an individual who is legally innocent are restricted by virtue of a possible risk of criminality. “Clear and convincing evidence”¹⁰² or “strong and specific reasons” are required for restraining the defendant’s liberty¹⁰³ on account of his presumed innocence and the rule of respect for individual liberty:¹⁰⁴ in other words, each bail case is examined on its merits unlike the “blanket” retention of DNA which could, until at least 2011, occur without conviction in England and Wales. Conversely, in contrast to pre-trial detention, and as the United Kingdom government emphasised in *S. v. United Kingdom*, there appears to be no practical consequence of retention for the relevant individual unless his DNA later matches a crime-scene profile.¹⁰⁵ Certainly, the impact on an individual’s rights as a result of DNA retention is more remote and undoubtedly of less immediate effect than the refusal of bail, but the incursion into personal freedoms that it entails is no less real. Storing DNA means state retention of unique personal data which may also reveal information about familial and genetic relationships and ethnic origin.¹⁰⁶ While the retention of DNA does not compromise liberty in the physical sense, a similarly cautious approach should be adopted when considering whether DNA should be stored after acquittal, or when no action at all is taken, given the potential use of DNA and the level of personal information contained within it. Moreover, bail refusal by definition ends on acquittal or the dropping of charges, whereas DNA retention may not. Given that the refusal of bail follows a court decision, judicial intervention should similarly be required for

¹⁰⁰ *Bail Reform Act* 1984 (U.S.); European Convention on Human Rights, Art. 5; *Criminal Code of Canada*, s.515(10)(b); *Bail Act* 2000 (New Zealand), s.8.

¹⁰¹ Larry Laudan, ‘The Presumption of Innocence: Material or Probatory?’ (2005) 11 Legal Theory 333, 337-338.

¹⁰² *Bail Reform Act* 1984, 18 U.S.C. § 3142(f).

¹⁰³ Andrew Ashworth, ‘Four threats to the presumption of innocence’ (2006) 10 International Journal of Evidence and Proof 241, 244.

¹⁰⁴ *W. v. Switzerland*, 17 E.H.R.R. 60; *Labita v. Italy*, 46 E.H.R.R. 50; *Smirnova v. Russia*, 39 E.H.R.R. 450.

¹⁰⁵ *S. v. U.K.* (n.7), [94].

¹⁰⁶ *ibid.*, [73]-[76].

the retention of a DNA sample, as occurs in Canada and after a prescribed time frame in the United Kingdom and New Zealand.

VII. POLICY TRANSFER

Incremental developments relating to non-conviction DNA databases across common law states may imply a convergence of laws and policies. While it is questionable whether these changes may be characterised as involving policy transfer as such, which would require purposeful imitative activity, certainly there is evidence of policy spread which involves societies becoming more alike purely by the successive adoption of specific policy approaches.¹⁰⁷ United States state agencies and projects¹⁰⁸ and periodical police literature¹⁰⁹ on DNA databases cite the “U.K. [sic] experience” approvingly, while academic commentary reviews critically the English approach.¹¹⁰ Nevertheless, an exploration of United States Senate and local debates indicates little evidence in political discourse or legislative debate of conscious or explicit emulation of other jurisdictions’ experiences or policies. Caution was sounded in New Zealand during the third reading of the *Criminal Investigations (Bodily Samples) Amendment Bill* about the “British” approach,¹¹¹ while in the academic

¹⁰⁷ Trevor Jones and Tim Newburn (n.4), 103; Colin Bennett, ‘What is policy convergence and what causes it?’ (1991) 21 British Journal of Political Science 215, 220-1.

¹⁰⁸ See US National Institute of Justice DNA Initiative, ‘Solving Property Crimes with DNA in the United Kingdom’ <<http://www.dna.gov/solving-crimes/property-crimes/uk-experience>> accessed May 2, 2011; Human Genome Project (HGP), ‘DNA Forensics’ <http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml> accessed May 2, 2011; W. Mark Dale, Owen Greenspan and Donald Orokos, *DNA Forensics: Expanding Uses and Information Sharing* (The National Consortium for Justice Information and Statistics, 2006), 3; Christopher H. Asplen Smith, *The Application of DNA Technology in England and Wales* (Smith, Alling, Lane, 2004) available at <<http://www.ncjrs.gov/pdffiles1/nij/grants/203971.pdf>> accessed May 2, 2011.

¹⁰⁹ See Ken Wallentine ‘Collection of DNA Upon Arrest: Expanding Investigative Frontiers’ *The Police Chief* (Alexandria, January 2010) <http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display&issue_id=12010&category_ID=3> accessed May 2, 2011.

¹¹⁰ See David H. Kaye, ‘Two Fallacies About DNA Data Banks for Law Enforcement’ (2001) 67 Brooklyn Law Review 179; Mark A. Rothstein and Sandra Carnahan, ‘Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks’ (2001) 67 Brooklyn Law Review 127; Mark A. Rothstein and Meghan K. Talbott, ‘The Expanding Use of DNA in Law Enforcement: What Role for Privacy?’ (2006) 34 Journal of Law and Medical Ethics 153; Michelle Hibbert, ‘DNA Databanks: Law Enforcement’s Greatest Surveillance Tool’ (1999) 34 Wake Forest Law Review 767.

¹¹¹ Parliament of New Zealand, *Criminal Investigations (Bodily Samples) Amendment Bill*, Third Reading, (October 27, 2009), Vol. 658, 7495, *per* Rahui Katene.

setting it has been argued that Australia is likely to follow English expansionism.¹¹² Conversely, discourse in Scotland emphasises resoundingly the differences between its scheme and that in place in England until 2011.¹¹³

Policy convergence in the context of non-conviction DNA databases is evident when countries resolve in a comparable way the competing demands of crime control and human rights. Indeed, the dominant narrative on non-conviction DNA databases has become one of risk rather than focusing on the appropriate level of state intervention in a liberal democracy, and this explains political support for the development and provides impetus for further expansion.¹¹⁴ While risk has always been of concern in criminal justice, now the political and popular preference is for risk control which aims to prevent the recurrence of a new crime and to eliminate risk completely, rather than management or reduction which accepts the inevitability of error.¹¹⁵

In England and Wales, risk was to the fore in justifying the continued existence of the non-conviction DNA database. *S. v. United Kingdom* prompted a lengthy consultation process by the Home Office, ostensibly “to provide a proportionate balance between protecting communities and protecting the rights of the individual”¹¹⁶ though the lack of a rights-focus in the resulting paper, “Keeping the right people on the database: Science and public protection”, is noticeable. The Home Office stressed that any change to the existing policy would “reduce the number of detections that DNA delivers, and will therefore have some adverse impact on public protection” and thus it aimed “to minimise this risk while complying with the ... ruling” of the court.¹¹⁷ This was an explicit acknowledgment that the Home Office sought to maintain as lengthy

¹¹² Kirsten Edwards, ‘Cold Hit Complacency: The Dangers of DNA Databases Re-Examined’ (2006-2007) 18 *Current Issues in Criminal Justice* 95.

¹¹³ See Scottish Government, *Acquisition and Retention of DNA and Fingerprint Data in Scotland. Consultation Report* (Scottish Government 2009), para. 18.

¹¹⁴ This stems from the seminal work of theorists such as Mary Douglas and Ulrich Beck. See Mary Douglas and Aaron Wildavsky, *Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers* (University of California Press 1982), and Ulrich Beck, *Risk Society: Towards a New Modernity* (Sheffield Region Centre for Science and Technology 1992).

¹¹⁵ Clear and Cadora contend that risk calculation may be for one of three purposes: risk control, risk management or risk reduction. Todd Clear and Eric Cadora, ‘Risk and Correctional Practice’ in Kevin Stenson and Robert R. Sullivan (eds) *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (Willan 2001), 59.

¹¹⁶ Home Office, ‘Keeping the right people on the DNA database – consultation and response’ <<http://www.homeoffice.gov.uk/documents/cons-2009-dna-database/>> accessed May 2, 2011.

¹¹⁷ Home Office, *Keeping the right people on the database: Science and public protection* (Home Office 2009), para. 2.9.

a retention period as would be permissible under the European Convention on Human Rights, and the definite emphasis in the consultation document is on risk rather than rights' analysis: "In determining the most suitable retention period, the key question is one of risk".¹¹⁸ Similarly, empirical studies on so-called "preventable crimes" have been relied upon in policy development in the United States and are often cited at federal and state level, indicating the growing centrality of risk in both discourse and practice.¹¹⁹ Such reference to science in criminal justice appeals to politicians who prefer the expertise of technical scientists who are seen as objective and non-ideological, in contrast to the "softer", and by implication ideologically driven, expertise of human right lawyers, criminologists, psychologists and political scientists, who are neglected increasingly in the policy making process. The use of science in criminal justice is ostensibly "universal, general, uniform, and neutral"¹²⁰ and fits with the distrust of professionals, criminologists, officials, and practitioners identified by Rock in the Home Office the mid-1990s¹²¹ and the pervasive fall of "liberal

¹¹⁸ *ibid.*, para. 6.6. For criticism of the methodology, see Keith Soothill and Brian Francis, *Keeping Innocent People on the DNA Database* (2009), available as Appendix 1 to *The Information Commissioner's response to the Home Office consultation paper on the retention, use and destruction of DNA data and fingerprints* available at <http://www.ico.gov.uk/upload/documents/library/data_protection/notices/response_to_ho_consultation_may09.pdf> accessed May 2, 2011.

¹¹⁹ See City of Chicago, 'Chicago's Study on Preventable Crimes' <http://sccvc.org/sccvc/news/Chicagos_Study_on_Preventable_Crimes03-04-2008.pdf> accessed May 2, 2011; 'Maryland Study on Preventable Crimes' <http://www.denverda.org/DNA_Documents/MarylandDNAarrestestudy.pdf> accessed May 2, 2011. See Congressional Records (Senate) July 29, 2005, S9528 *et seq.*, and December 16, 2005, S13756, *per* Mr Kyl; July 14, 2008, H6438 and December 10, 2009, S12904-S12907, *per* Mr Schiff. For example, see the minutes of the meeting of the Assembly Committee of Nevada on the Judiciary, Seventy-Fifth Session, March 13, 2009; Governor O'Malley, 'Comments on DNA Collection' (Maryland Politics Watch, March 26, 2009) <<http://maryland-politics.blogspot.com/2009/03/omalley-comments-on-dna-collection.html>> accessed May 2, 2011; 'House Judiciary Committee Adopts Schiff Amendments to Improve DNA Tools for Law Enforcement and Investigators and Eliminate DNA Backlogs' (*Website of Congressman Adam Schiff*, June 11, 2008) <<http://schiff.house.gov/index.cfm?sectionid=124&parentid=25§iontree=6,25,124&itemid=276>> accessed May 2, 2011.

¹²⁰ Richard Ericson and Clifford Shearing, 'The Scientification of Police' in Gernot Bohme and Nico Stehr (eds) *The Knowledge Society* (Kluwer Publishing 1986), 133.

¹²¹ Paul Rock, 'The Opening Stages of Criminal Justice Policy Making' (1995) 35 British Journal of Criminology 1, 2.

elitism” in the governance of crime.¹²² Thus, while collection and retention of DNA encroaches on civil liberties, policy makers may couch the debate in terms of empirical validity to ensure the palatability of such policies. Nevertheless, the discourse of risk has yet to result in systematic retention of DNA from non-convicted persons in Canada, but it has contributed to the extension of schemes in Australia and New Zealand.

VIII. CONCLUSION

This analysis demonstrates the points of commonality that are emerging in the context of non-conviction DNA databases in various common law countries, though divergence remains regarding the populations from whom DNA may be acquired and the length of time for which DNA may be retained. Underpinning this is a shift to a risk-based approach, although Canada seems to have withstood such pressures to a larger extent. As the Canadian Supreme Court has commented, “The taking and retention of a DNA sample is not a trivial matter and, absent a compelling public interest, would inherently constitute a grave intrusion on the subject’s right to personal and informational privacy.”¹²³ In addition, inclusion on a state database is stigmatising and represents an expression of suspicion by the state. Thus, the schemes in place should be limited to the greatest extent in terms of the populations included and the retention periods, and should require judicial warrant: to this end, notwithstanding the ability to use all necessary force to obtain samples, the Canadian federal model seems preferable.

¹²² See Ian Loader, ‘Fall of the “Platonic Guardians”: Liberalism, Criminology and Political Responses to Crime in England and Wales’ (2006) 46 *British Journal of Criminology* 561, 562 *et seq.*

¹²³ *R. v. R.C.* 2005 SCC 61, [2005] 3 S.C.R 99, [39].

PREVENTIVE SENTENCES AND ORDERS: THE CHALLENGES OF DUE PROCESS

KRIS GLEDHILL*

ABSTRACT

Measures designed to prevent individuals committing future crimes are increasingly part of legal regimes in common law jurisdictions, typically made in relation to sexual offenders or violent offenders and typically imposed on the basis of evidence that the offender poses a risk of further offending that is unacceptable. These measures may be in the form of community monitoring or restrictions, or both; but they may also extend to preventive detention. One of the many questions arising is the extent to which courts are alert to the difficulties of making such assessments and the rigour of the process followed. This article outlines these difficulties, and reviews whether the courts in England and Wales, New Zealand and Australia are alert to them.

I. INTRODUCTION

In *R. v. Boswell*,¹ one of the grounds of challenge to the imposition of an indeterminate term of imprisonment for public protection for making threats to kill was to the conclusion of the writer of the pre-sentence report that the use of “the probation tools” suggested that Mr Boswell “presents as a high risk of harm to the public, particularly to females with whom he may be involved in a relationship”. Giving the judgment of the Court of Appeal, upholding the sentence, Dyson L.J.² dismissed a criticism of the use of the “probation tools”, commenting that:

“Those tools are no doubt the product ... of a good deal of research and provide a satisfactory basis for reaching conclusions of the kind that were reached in this case.”³

Despite this case involving the potential imprisonment for life of the defendant, there is no display even of intellectual curiosity into the “probation tools”.⁴ Such tools, and sentences or court orders that are designed to respond to the risk of future offending, are becoming a significant part of the criminal justice system, particularly in relation to violent or sexual offending.

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¹ [2007] EWCA Crim. 1587.

² Now Lord Dyson J.S.C.

³ *Boswell* (n.1), [12].

⁴ Which would probably have included the Offender Assessment System (OASys): this is mentioned further *post*.

The central function of the criminal court involves looking back to determine whether the crime occurred, and, if it did, to pass a sentence to mark the essentially backward-looking feature of punishment. It has always been the case that the sentencing function would also look to the future: the obvious example is deterrence.⁵ But an aspect of sentencing that has grown in prominence is the need to protect the public, which involves the court looking forwards: so section 142(1)(d) of the *Criminal Justice Act* 2003 expressly refers to public protection as a purpose of sentencing in England and Wales, as does section 7(1)(g) of the *Sentencing Act* 2002 for New Zealand. Since public protection should follow from deterrence and also from the positive effects of rehabilitative programmes in a prison setting, it can be taken that these statutory references to public protection are designed to cover the incapacitation of the offender.

The growing prominence of this function of protecting the public from future crime mirrors the recognition that the state has a duty to protect that entails not just the deterrent effect of the criminal law but also an obligation to take specific operational steps when there is a known risk of criminal behaviour. Whilst the latter duty comes complete with an acceptance that it is only in limited circumstances that it arises, because of the difficulty of predicting human behaviour, the use of preventive sentences and orders has proceeded on the basis that it is possible to identify future violence to a degree of certainty that makes it appropriate for a court to make a coercive order.

This article examines two overlapping issues that arise in this context. The first is the approach to the question of preventive detention or control and its relationship with the duty to protect: it is suggested that the use of preventive regimes in the criminal process arises primarily from a power to protect rather than from the duty; and that consequently the touchstone is whether the use of the power is arbitrary in any particular situation.

The second is the approach that should be adopted by courts to the evidence presented in relation to the risk assessment questions behind the imposition of preventive orders. It is suggested that the limitations on the duty to protect must be borne in mind at this stage because, in order to achieve due process or fairness and avoid arbitrariness, the difficulty of prediction is relevant. It is noted that the courts in jurisdictions which often compare themselves in terms of standards of due process have adopted markedly different approaches; and it is suggested that the courts of New Zealand have

⁵ The purposes may be developed by the judiciary, but it is increasingly likely that they will have been given a statutory basis as legislatures have taken it as their task to provide frameworks for the judiciary. See, for example, the *Criminal Justice Act* 2003 (U.K.), s.142, or the *Sentencing Act* 2002 (N.Z.), s.7.

developed an approach that is more likely to secure due process. It will be suggested that the needs of due process mean that there should be a much more cautious acceptance of the results of the risk assessment tools as a guide for judgment than the large measure of deference accorded them by Dyson L.J. in *Boswell*.

II. PREDICTING THE FUTURE: THE BACKGROUND

A. Context

Whilst much judicial work involves assessing what is proved to have happened in the past (a finding of what is most likely to have happened in the past), it is also common for judges to have to predict the future and to assess what is likely to happen. There are many examples of this in a criminal or quasi-criminal context. So, in bail hearings, questions will arise as to the risk of the defendant absconding (itself typically an offence) or further offending, including by way of interfering with witnesses in a manner that would be criminal. In these situations, a judgment has to be made as to the future and as to whether the deterrent effect of a further penalty is adequate to prevent the undesirable outcome. Similarly, if a person poses a risk to others on the basis of a mental disorder, there are regimes in place in most jurisdictions to allow preventive detention rather than requiring the relevant authorities to wait for a criminal act to occur: in such a case, it may be that the deterrent effect of the criminal process (including such matters as findings of unfitness to stand trial followed by a process to determine whether the *actus reus* was committed) is not of any real weight.

Of course, the desire to prevent harm is understandable. That is, no doubt, the motive behind the growth of regimes allowing protective actions to be taken against those who are judged to pose a risk of future criminality, particularly in relation to violent or sexual offending. It is difficult to argue against preventive action being taken in such a case, extending to deprivation of liberty if necessary, but subject to the obvious caveat that there must be adequate satisfaction as to the risk of future criminality. This will not arise solely from the fact that the person has perpetrated an offence in the past.

International human rights standards are of relevance in this context; these allow preventive detention. Under Article 5(1) of the European Convention on Human Rights 1950,⁶ detention is

⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, November 4, 1950) <<http://www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm>> last accessed April 20, 2011.

permissible only in certain circumstances, but those include a collection of situations in Article 5(1)(e) – including alcoholism and mental disorder – that have been noted to have a theme of public protection. So in *Litwa v. Poland*,⁷ the European Court of Human Rights noted that “a predominant reason why the convention allows the persons mentioned in paragraph (1)(e) of Article 5 to be deprived of their liberty is not only that they are dangerous for public safety but also that their own interests may necessitate their detention”.⁸ The underlying motif of Article 5 is that it is designed to prevent detention that is arbitrary:⁹ this is the standard that is applicable under the International Covenant on Civil and Political Rights,¹⁰ the United Nations’ equivalent to the European Convention on Human Rights, Article 9(1) of which provides that detention must follow a lawful procedure and cannot be arbitrary.

Groups against whom preventive action is taken may be unlikely to evoke public sympathy. This is certainly the case in the current era, in which punitive notions seem to have captured the public mood. However, the strength of a legal system is often assessed by its ability to give effect to the fundamental rights of unpopular groups. Cases where courts have failed to recall this become notorious. For example, the House of Lords sitting during the Second World War in *Liversidge v. Anderson*¹¹ interpreted a requirement that the Home Secretary should have “reasonable cause” to categorise someone as hostile to the United Kingdom as preventing any court review beyond establishing the good faith of the Home Secretary. Lord Atkin dissented, noting that the need for “reasonable cause” imported the language of objective justification into which the courts

⁷ 33 E.H.R.R. 53, [2000] M.H.L.R. 226, at [60].

⁸ Also of potential relevance here is Art. 5(1)(b), which allows detention to secure the fulfilment of any obligation prescribed by law: there is limited case law on this provision, and it may be that it requires a specific obligation rather than a more general obligation such as the need to obey the criminal law. In relation to the need for a restrictive interpretation, see *Engel v. The Netherlands* (No. 1), 1 E.H.R.R. 647 (European Court of Human Rights).

⁹ There are many examples of this: one of them is *H.L. v. U.K.*, 40 E.H.R.R. 761, [2004] M.H.L.R. 236 (European Court of Human Rights).

¹⁰ U.N. Treaty No I-14688, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966; entry into force March 23, 1976, in accordance with Article 49 (35 signatures); available at <<http://treaties.un.org>> last accessed April 7, 2011, or at <<http://www2.ohchr.org/english/law/ccpr.htm>> last accessed April 7, 2011.

¹¹ [1942] A.C. 206.

could inquire.¹² It is now accepted that the majority in the case were wrong.¹³

B. History

Given the attractiveness of preventing harm before it has happened, it is not surprising that it has been tried in the past. It has been found to be problematic. So, from the 1930s onwards, more than half of the states of the United States of America introduced legislation to deal with “sexual psychopaths”, broadly those with an unstable personality who were unable to comply with social norms and laws and had a compulsion to commit sexual offences.¹⁴ At the same time, statutes authorised action to prevent harm to society in other contexts, including to prevent the birth of children who would grow up to be a burden on society. Such eugenic statutes were common in the United States, and they passed constitutional muster: in *Buck v. Bell*¹⁵ the Supreme Court upheld the Virginia *Eugenical Sterilization Act* 1924, which rested on the view that the science behind eugenics was adequately established.¹⁶

¹² In an unusually caustic comment about his colleagues, Lord Atkin said, at 244: “I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. Their function is to give words their natural meaning, not, perhaps in war time leaning towards liberty In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom ... that the judges ... stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case, I have listened to arguments which might have been addressed acceptably to the Court of King’s Bench in the time of Charles I.”

¹³ See Beatson, Matthews and Elliot, *Administrative Law, Text and Materials* (3rd edn, Oxford University Press 2005), 75: “Although *Liversidge v. Anderson* has never been overruled, it is perfectly clear that Lord Atkin’s dissenting view is today regarded as the correct one...”. In *Khanuja v. Secretary of State* [1984] A.C. 74 (House of Lords), Lord Bridge speaks of the “now celebrated” dissent of Lord Atkin, and Lord Scarman comments that “The classic dissent of Lord Atkin ... is now accepted ... as correct ... in its declaration of legal principle.”

¹⁴ For a description, see John Kip Cornwell, ‘Protection and Treatment: The Permissible Civil Detention of Sexual Predators’ 53 Wash. & Lee L. Rev. 1293. See also John M. Fabian, ‘*Kansas v. Hendricks, Crane and Beyond*’ (2003) 29 William Mitchell Law Review 1367.

¹⁵ (1927) 274 U.S. 200.

¹⁶ *Virginia Acts of Assembly* 1924, ch. 394, preamble: “... both the health of the individual patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives under careful safeguard and by competent and conscientious authority; and ... human experience has demonstrated that heredity plays an important part in the transmission of insanity, idiocy, imbecility, epilepsy and crime ...”.

The preventive detention statutes relating to sexual psychopaths were all largely repealed by the end of the 1980s “principally due to concerns about civil rights and the apparent lack of success of sex-offender treatment programs”.¹⁷ The eugenic sterilisation statutes also fell into disuse or were repealed.

Civil rights arguments from the United States are also important for another reason. *Baxstrom v. Herold*¹⁸ involved the propriety of detention of Mr Baxstrom in a prison hospital after the end of his sentence. It was found to be unconstitutional because the process followed (certification by a doctor) was not as stringent as that applicable to a person being detained from the community (jury trial): as such, there was differential treatment that breached the equal protection provisions of the Fourteenth Amendment to the United States Constitution.¹⁹ The significance of the case for present purposes is its consequences and the research into those consequences. In the first place, many patients were transferred to civil mental hospitals and often then released;²⁰ secondly, there was a significant group of people whose release from preventive detention allowed research on whether the claims that they were dangerous were borne out. The recidivism rate in relation to violent offending was found to be 11 per cent (though it is to be noted that about a third of the patients remained detained in civil hospitals).²¹ This revealed a poor correlation between predictions of future crime and recidivism and hence a reason to be cautious about the ability to predict the future and base action on such predictions.

¹⁷ Cornwell (n.14), 1297.

¹⁸ (1966) 383 U.S. 107.

¹⁹ Amendment XIV (1868), Section 1 “No state shall … deny to any persons within its jurisdiction the equal protection of the laws.”

²⁰ Tony Maden, *Treating Violence* (Oxford University Press 2007), 28: “New York State realized that 966 other detained patients in their hospitals for the criminally insane could petition … on the same grounds and could expect to win. They gave in gracefully and ordered that all 967 patients should be transferred to civil mental hospitals within the space of a few months.” *Dixon v. Att.-Gen. of the Commonwealth of Pennsylvania* (1971) 325 F. Supp. 966 had a similar impact in that state.

²¹ Thomas R. Litwack and others, *Violence Risk Assessment: Research, Legal and Clinical Considerations*, in Weiner and Hess (eds), *The Handbook of Forensic Psychology* (3rd edn, John Wiley & Sons 2006). They commented (at 491) that, in relation to the *Baxstrom* and *Dixon* patients, “Follow-up studies determined that only a small percentage had to be returned to secure facilities, and that only a small minority of patients ultimately released to the community were rearrested for violent offences.” Therefore, “determinations of dangerousness for the purpose of preventive detention warrant careful judicial scrutiny.”

C. The New Techniques of Risk Assessment

The obvious response to the research into the *Baxstrom* patients was a recognition of the need to improve predictions as to future dangerousness. In addition, there was a shift in focus, from the late 1960s, from a paternalistic concern as to the treatment needs of those seen to be in need, to the risk that they would behave in a manner harmful to others, and the need for public protection.²²

As a result, there has been a significant growth in risk assessment mechanisms, particularly those making use of statistical or actuarial evaluations. Monahan notes that "The general superiority of statistical over clinical risk assessment in the behavioural sciences has been known for almost half a century".²³ As there were few tools designed to predict violence, the MacArthur Study, in which Monahan was involved, sought to collate factors prevalent in those who had been admitted to a psychiatric facility and were then involved in further violence.²⁴ The MacArthur Study was one of several. There is now a significant number of tools designed to provide some form of actuarial score of the risk of future violence: a leading Australian text on evidence lists 29 tools.²⁵ The idea behind these tools was to apply an actuarial method, similar to that used in the life insurance industry, to information collected about a large number of offenders, to give statements of probability of reoffending.²⁶

For example, the VRAG tool was created from a seven-year follow-up on 618 male offenders who also had mental disorders and who passed through the Pentanguishene Mental Health Centre in Ontario. The files on those being studied were coded for the presence or absence of 50 factors and compared against reports of further offending.²⁷ Twelve factors were felt to have predictive associations, which were:²⁸

²² Monahan and others, *Rethinking Risk Assessment (The MacArthur Study of Mental Disorder and Violence)* (Oxford University Press 2001), 3.

²³ *ibid.*, 7, citing studies commencing in 1954.

²⁴ Data was collected from mid-1992 to late 1995 on over 1,100 patients, leading to conclusions as to what features were linked with future violence: 'The MacArthur Violence Risk Assessment Study – Introduction' <http://www.macarthur.virginia.edu/read_me_file.html> last accessed April 20, 2011.

²⁵ Freckleton and Selby, *Expert Evidence – Law, Practice, Procedure and Advocacy* (4th edn, Lawbook Co. 2009), ch. 39, 'Prediction of Risk Evidence'. Maden (n.20), 92, speaks of a "Risk Assessment Industry".

²⁶ Maden (n.20), 79.

²⁷ See Monahan (n.22), 8.

²⁸ Maden (n.20), 82.

- the score on another tool, the Hare Psychopathy Checklist (designed to assess whether someone is a “psychopath”);²⁹
- problems at junior school;
- personality disorder;
- alcohol abuse;
- separation from parents before age 16;
- failure on prior conditional release;
- history of non-violent offending;
- never married;
- schizophrenia;
- the extent of victim injury;
- age; and
- a female victim.

The presence of the first eight factors was positively associated with further offending (*i.e.* made it more likely), the presence of the last four factors had a negative association with further violent offending (*i.e.* made it less likely).³⁰ The VRAG tool is one that examines factors that are objectively ascertainable and on the whole are unchanging: these are static factors, and some of the risk assessment tools measure only such factors. Others combine these factors with dynamic factors, namely ones that are amenable to change over time.

The number of different tools can be taken as an indication that this is a developing field. This has been recognised judicially: in *D.P.P. v. Moolarrie*,³¹ Blaxell J. of the Western Australia Supreme Court noted that:

“It is ... clear from a number of published articles in reputable international journals ... that these tools are at an early stage of development and involve an area of behavioural science which is the subject of some controversy.”³²

It is also worth noting that there are disputes as to whether tools based solely on static factors provide a superior outcome to those that incorporate dynamic factors. Maden gives a hint of the dispute (and of his position):

²⁹ This assesses 20 features, ranging from “interpersonal/affective” features such as glibness, lack of remorse, lack of empathy; “social deviance”, such as parasitic lifestyle, lack of realistic long-term goals, juvenile delinquency; and further items, including number of short-term marital relationships. See *ibid.*, 88-9.

³⁰ Maden (*ibid.*, 82) notes that the association of these last four with reduced reoffending may seem surprising, but points out that the study’s authors would defend it as merely reporting factual trends.

³¹ [2008] WASC 37, available at <<http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf>> last accessed April 20, 2011.

³² *ibid.*, [41]. His Honour concluded that the psychiatric evidence as to whether the defendant was dangerous was based primarily on a clinical rather than actuarial foundation, and so was admissible: [86].

"While enthusiasts argue that actuarial methods should supplant clinical estimation of risk, a more balanced review concludes that the proper place of such instruments is as an adjunct to good clinical practice."³³

The position of proponents of tools based solely on static factors is that, whether counter-intuitive or not, the results from such tools have proven reliability, whereas anything dynamic typically involves a judgment made on progress in addressing a risk factor, and therefore reintroduces the very element of judgment which has been found wanting in the past.

Typically, the tools work by collating and scoring answers to a list of questions as to whether a given feature is definitely present, partially or probably present, or absent.³⁴ The overall score can then be compared against the scale developed in the research that gave rise to the tool, to provide a prediction of the risk of further offending.³⁵ It is important to note that the outcome of the scoring of the tool is actuarial: just as an actuary working in the life insurance industry cannot predict the death of an individual, but is limited to saying what will happen on average to a group of people with the identified characteristics, so it is for violence risk assessments.³⁶ Accordingly, a conclusion that a defendant presents a 30 per cent risk of committing a further offence within the next 10 years means that 30 per cent of people sharing the defendant's characteristics will commit a further offence if they act in the same way as the group on whom the study was based. The tool cannot say whether an individual will be one of the group who will or one of the group who will not.

It is also important to note that the studies on which the tools are based are not 100 per cent accurate. In the study that led to the VRAG tool and its twelve factors, when the offenders were categorised into those with a "high" or "low" likelihood of reoffending, "55 per cent of the group scoring high committed a new violent offence compared with 19 per cent of the group scoring low."³⁷ This is an impressive level of association; however, it is equally true to say that, whereas 19 per cent of those assessed as low risk were falsely-assessed as low-risk because they did commit an

³³ Maden (n.20), 97.

³⁴ Depending on the nature of the tool, it may involve reviewing files on the subject, or assessing the subject at interview, or both.

³⁵ See, for example, Maden's description of two well-known instruments that use this scoring method, the PCL-R tool (the Hare Psychopathy Checklist, referred to *ante*) that measures whether someone is a psychopath and the HCR-20 (Historical Clinical Risk-20): Maden (n.20), 88 and 105. Both involve 20 questions.

³⁶ See Parry and Drogin, *Mental Disability, Law, Evidence and Testimony* (ABA 2007), 276: "actuarial predictions consider how people similar to the defendant have acted in the past in similar circumstances".

³⁷ See Monahan (n.22), 8.

offence, 45 per cent of those assessed as high-risk were falsely placed there, in that they did not commit a further offence.

It should be readily apparent that the use of these risk assessment tools raises issues for the prediction of dangerousness in relation to an individual: the tools are developing, are subject to continuing debate within the expert community, do not produce the individualised results that courts need, and produce results that have error rates; but their development is predicated on the frailties of professional judgment in predicting the future behaviour of individuals. What the courts should do in light of these features should be a subject for debate. The fifth part of this article will examine the extent to which there has been such a debate in the courts. But, first, it sets out briefly the framework which makes preventive action legitimate, and the relevant statutes.

III. THE DUTY AND POWER TO PROTECT

A. *The State's Duty to Protect*

The main human rights documents represent an attempt to create a framework against which to analyse whether individual rights are infringed. Certain infringements are permitted for the protection of the rights of someone else, or of society in general. The main international human rights treaty is the International Covenant on Civil and Political Rights 1966.³⁸ The rights particularly relevant for present purposes are:

- (i) the right to have life protected in Article 6(1);³⁹
- (ii) the right to avoid arbitrary loss of liberty in Article 9(1);⁴⁰
there is also a *habeas corpus* right to have a court review of the lawfulness of detention in Article 9(4); and
- (iii) the right to privacy and protection of the family in Article 17.⁴¹

These rights are replicated in various regional human rights instruments, including the European Convention on Human Rights:⁴² Article 2 protects the rights to life, Article 5 the right to liberty and Article 8 the right to privacy. The language of the European

³⁸ See n.10, *ante*.

³⁹ "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

⁴⁰ "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."

⁴¹ "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."

⁴² See n.6, *ante*.

Convention is somewhat different to that in the International Covenant on Civil and Political Rights: to use Article 5 as the example, rather than set out a general right not to be subject to arbitrary detention, it sets out a general right to liberty and provides that it can only be taken away in a given list of circumstances and provided that it is “lawful” to do so.⁴³ But the European Court of Human Rights has made it clear that the primary objective of the language is to ensure that there is no arbitrariness in detention.⁴⁴

In relation to the right to life, Article 6 of the International Covenant on Civil and Political Rights provides a protection against arbitrary deprivation of life; Article 2 of the European Convention prevents the intentional taking of life but then qualifies that in relation to self-defence, lawful arrest or prevention of escape and quelling of riots provided that no more than absolutely necessary force is used, which seems to define circumstances lacking in arbitrariness. Both instruments provide expressly for the protection of the right to life, thereby ensuring that it is not just a matter of a negative obligation on the state not to take life but also a positive duty. This was usefully summarised by the House of Lords in *R. (Middleton) v. West Somerset Coroner*:⁴⁵

“The European Court of Human Rights has repeatedly interpreted Article 2 ... as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.”⁴⁶

In addition to a “framework of laws”, it is also necessary to have a “framework of ... precautions, procedures and means of enforcement” so as to protect life. This may extend to offering protection against individual assailants. In *Mastromatteo v. Italy*,⁴⁷ the Grand Chamber of the European Court of Human Rights examined whether Article 2 was breached when a member of the public was killed by prisoners who had absconded from prison leave granted on the basis of a finding that they did not pose an undue risk. The court held that the applicable principles were:

- (i) the primary specific obligation arising under the duty to safeguard life was to put in place effective criminal-law

⁴³ The various forms of lawful arrest listed include “the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants”: see Art. 5(1)(e).

⁴⁴ See, as a recent example, *H.L. v. U.K.* (n.9), [115].

⁴⁵ [2004] UKHL 10, [2004] 2 A.C. 182.

⁴⁶ *ibid.*, [2].

⁴⁷ App. no. 37703/97 (European Court of Human Rights, Grand Chamber, October 24, 2002) [2002] Inquest L.R. 182, [2003] Prison L.R. 11.

provisions to deter offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions;

- (ii) there might also be a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual; but
- (iii) this obligation had to be interpreted in a way that was not disproportionate in light of the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.

The court concluded that:

“Accordingly, not every claimed risk to life can entail for the authorities a convention requirement to take operational measures to prevent that risk from materialising. A positive obligation will arise, the court has held, where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”⁴⁸

The court then noted that this duty might be breached by the action of prisoners, given that “[o]ne of the essential functions of a prison sentence is to protect society, for example, by preventing a criminal from re-offending”.⁴⁹ But, in assessing whether there was a breach of duty, account had also to be taken of the fact that it was proper to have a process of reintegrating prisoners into society by early release. The court observed that the Italian system of early release required good behaviour in prison and willingness to participate in a rehabilitation programme, and a judicial assessment that the prisoner did not present a danger to society; and those convicted of certain serious offences could not qualify for leave. This system was adequate from the point of view of the obligations under Article 2:

“The court considers that this system in Italy provides sufficient protective measures for society. It is confirmed in this view by the statistics supplied by the respondent state, which show that the percentage of crimes committed by

⁴⁸ *ibid.*, [68]; the authorities cited by the court were: *Osman v. U.K.*, 29 E.H.R.R. 245 (European Court of Human Rights), [116]; *Edwards v. U.K.*, 35 E.H.R.R. 487 (European Court of Human Rights), [55]; and *Bromiley v. U.K.*, App. No. 33747/96 (European Court of Human Rights, November 23, 1999).

⁴⁹ *Mastromatteo v. Italy* (n.47), [72].

prisoners subject to a semi-custodial regime is very low, as is that of prisoners absconding while on prison leave [...]. Accordingly, there is nothing to suggest that the system of reintegration measures applicable in Italy at the material time must be called into question under Article 2.⁵⁰

The test for a breach of Article 2 – namely, whether there was a failure to do all that could reasonably be expected to avoid a real and immediate risk to life of which the authorities had or ought to have had knowledge – was not met on the facts because the information available did not suggest that the prisoners involved would pose a real and immediate threat to life on release; nor could this be said to arise from the fact that one of the prisoners was released after a previous accomplice had absconded, as there was no material suggesting that there was a conspiracy afoot; and the failure of the police to arrest the absconders was not shown to involve any negligence.⁵¹

The facts of *Mastromatteo*, in which the central question was whether or not the state should have predicted violence and so have taken action to prevent it, are obviously analogous to the question of whether someone who has a conviction for a sexual or violent offence should be subjected to specific preventive measures based on the assessment of the risk they pose. If it is not possible for the state to say that there is a real and immediate risk to the life of an identified individual or individuals, then there is no duty to the putative victim to take preventive measures against the putative assailant. In such a case, the duty of the state is to have in place a criminal law that prohibits assaults (or behaviour that may be linked with causing harm, such as possession of offensive weapons) and a police force able to take action to enforce the law.

B. Preventing Arbitrary Detention

If the risk assessment techniques available allow the identification of those individuals who do in fact present that real and immediate risk to the life of an identified individual or individuals, the corollary is that the duty to take measures exists. The limitations of the actuarial tools suggest that they will not allow the identification of such a risk. No doubt there are situations in which the risk posed by a particular individual is high enough to engage the duty; but that will not arise on the basis merely of membership of a group that is statistically likely to offend over a particular time period. Something more will be required.

But, if a duty to detain does not arise, a second question that does arise is whether there is a power to operate a regime of preventive

⁵⁰ *ibid.*, [72]-[73].

⁵¹ *ibid.*, [76]-[78].

detention. The exercise of such a power must be weighed against the rights of the person against whom the measures will be directed. The human rights framework indicates that where the duty to protect does not arise (such that there is no-one with a right to protection because there is no sufficiently clear threat from which the authorities can be required to give protection), society may intervene provided that it does so in a manner that is not arbitrary and so does not infringe the rights of the person against whom action is taken. This involves asking whether there would be an arbitrary loss of liberty (if it is preventive detention) or an arbitrary interference with privacy (if it is a form of monitoring).⁵²

When considering the avoidance of arbitrariness, the context set out above becomes important. The ability of professionals to predict future crime has been shown by the *Baxstrom* research to be limited. Although actuarial tools have since been developed, they at best produce a result for a group rather than for an individual. Accordingly, the question arising from the results of the risk assessment tools alone is whether it is proportionate, or whether it is arbitrary, to impose measures on all people who are identified as being members of that group who pose a risk, and so to provide restrictions on both the true positives (who will offend) and the false positives (who will not), in order to prevent or reduce the risk of further criminal activity by the true positives. It is suggested that the tests of proportionality and arbitrariness also allow consideration of fundamental features of the system of justice, which may seem so self-evident that they risk being forgotten: one of these is the need to avoid group condemnation (which in a wholly criminal context would equate to guilt by association), given that action against an individual should be based on an assessment of that individual.

Another fundamental principle is that the condemnation of a person as a criminal requires proof beyond reasonable doubt of the commission of an offence; this can be taken as ensuring that the risk of error is one that falls on the state (or society as a whole) rather than the individual charged. Should there be any different approach when a person is condemned as someone who poses too much of a risk? From the point of view of the person against whom the action is taken, it is no doubt true that the effect is the same as detention or community monitoring as part of a criminal sentence. Moreover, the action is taken on the basis of a view that the person is a future

⁵² See *Uzun v. Germany*, App. No. 35623/05 (European Court of Human Rights, September 2, 2010). Also relevant would be the right to freedom of movement in Protocol No. 4, Art. 2, to the European Convention on Human Rights, or Art. 12 of the International Covenant on Civil and Political Rights; both may be curtailed by proportionate restrictions, so the same analysis applies.

criminal, and so the element of stigma is the same (and, indeed, could be higher since the basis for taking the measure is that the person cannot help but be criminal despite the deterrent effect of punishment). In addition, when criminal offences are created on the basis of the risk posed by a particular action, such as speeding in a vehicle or possession of an offensive weapon, the criminal standard of proof applies: why should it not be the case when the analysis is that the defendant is himself the risk (“possession of a dangerous personality”)?

On the other hand, as the aim of the measures at issue is to prevent harm from occurring, a parallel may be drawn with detention on the grounds of mental disorder, which is long-established to be a civil detention to which the criminal standard of proof does not apply. As is noted below, there have been different conclusions on whether preventive orders are civil or criminal, and as to what standard of proof is applicable to the risk assessment question behind them.

IV. PREVENTIVE ORDERS: THE CURRENT LEGISLATION

The final sections of this article turn to the current regimes in place and the case law as to whether the courts are applying the basic standards of due process.

A. The United States of America

As noted above, the “sexual psychopathy” laws that were common in the United States from the 1930s onwards disappeared from the statute books by the late 1980s, but “sexually violent predator” laws have been promulgated in around half of the states since the model was introduced by Washington in 1990 as part of the mental illness section of the *Washington Code*.⁵³ The target of the legislation is the “sexually violent predator”, defined as:

“(16) ‘Sexually violent predator’ means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.”⁵⁴

⁵³ The *Revised Code of Washington*, title 71, “Mental Illness”, specifically Chap. 71.09, available at <<http://apps.leg.wa.gov/RCW/>> last accessed April 25, 2011. The law is predicated on legislative findings that the existing mental health regime is inadequate to deal with the personality disorders that lead to repeat sex offending: Section 71.09.010, “Findings” of the legislature.

⁵⁴ Section 71.09.020, “Definitions”.

The legislation allows the post-sentence detention of such a person (whether or not they have already been released) if there is proof beyond a reasonable doubt that the person is a sexually violent predator.⁵⁵ (Other states may have a lesser standard: in Virginia, for example, the standard is “clear and convincing evidence”.)⁵⁶ Detention continues until the person no longer meets the definition or conditional release will meet public safety needs.⁵⁷ The version of the legislation adopted in Kansas has been upheld by the United States Supreme Court in *Kansas v. Hendrick*,⁵⁸ and *Kansas v. Crane*,⁵⁹ it was determined that the detention was civil in nature and was valid provided that the requirements of due process were met.

B. Australia

Queensland has the *Dangerous Prisoners (Sexual Offenders) Act 2003*,⁶⁰ which provides control over those who have been in prison for sexual offending involving violence or children and are found to present an unacceptable risk of committing a further such offence if released, or if released without supervision – so the court may order detention (which will continue until the order is rescinded)⁶¹ or release under supervision. This requires “cogent evidence ... to a high standard of probability”.⁶² The matters to be taken into account are any that the court considers to be relevant, but this must include medical evidence, the results of any offending behaviour work, antecedents and information as to propensity to offend.⁶³ Similar legislation is in place in New South Wales, in the *Crimes (Serious Sex Offenders) Act 2006*,⁶⁴ under which an order for continuing detention lasts for up to five years, but may be renewed.⁶⁵ See also the *Dangerous Sexual*

⁵⁵ Section 71.09.060, “Trial – Determination – Commitment procedures”.

⁵⁶ *Virginia Code*, s.37.2-908, title 37.2 – “Mental Health, Mental Retardation, and Substance Abuse Services”, Chap. 9 – “Civil Commitment of Sexually Violent Predators”, available at <<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC>> last accessed April 25, 2011. This is the standard applicable to mental health detention in the United States: see *Addington v. Texas*, 441 U.S. 418 (1979).

⁵⁷ Section 71.09.060. There is a right to treatment (Section 71.09.080, “Rights of persons committed under this chapter”) and a review process (Section 71.09.070, “Annual examinations of persons committed under this chapter”, and Section 71.09.090, “Petition for conditional release to less restrictive alternative or unconditional discharge – Procedures”).

⁵⁸ 521 U.S. 346 (1997).

⁵⁹ 534 U.S. 407 (2002).

⁶⁰ Available at <<http://www.legislation.qld.gov.au/OQPChome.htm>> last accessed April 25, 2011.

⁶¹ S.13(5).

⁶² S.13(3).

⁶³ S.13(4).

⁶⁴ Available at <<http://www.legislation.nsw.gov.au/>> last accessed April 25, 2011.

⁶⁵ S.18.

Offenders Act 2006 in Western Australia,⁶⁶ and the *Serious Sex Offenders (Detention and Supervision) Act* 2009 in Victoria (which added the prospect of detention to the previous legislation, the *Serious Sex Offenders Monitoring Act* 2005).⁶⁷

C. New Zealand

New Zealand's regime does not provide for detention but instead allows for community supervision of those found to pose a risk of further offending, through "extended supervision orders". This is regulated by Part 1A of the *Parole Act* 2002, inserted by the *Parole (Extended Supervision) Amendment Act* 2004.⁶⁸ An order may be made, in relation to anyone convicted of a sexual offence involving a victim under 16, for their post-release supervision for up to 10 years. Section 107I sets out the basis for the making of the order and indicates that risk assessment is central: its purpose is "is to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing sexual offences against children or young persons" and the order may be made if the court is satisfied that "the offender is likely to commit" a further such offence.

The statute does not set out the standard of proof applicable: although it has been determined that an extended supervision order is a penalty,⁶⁹ it has also been determined that it does not follow that the criminal standard of proof applies. Rather, the Court of Appeal in *R. v. McDonnell*⁷⁰ has ruled that the statutory requirement that the court be satisfied as to the likelihood of the commission of a further offence is simply a matter of it reaching a judicial conclusion as to that, rather than applying a particular standard of proof. The court expressly rejected the view of the High Court that it was necessary to be satisfied to the criminal standard that the relevant risk existed.

Whilst New Zealand law does not at present allow for an application for preventive detention at the end of a prison sentence, it does have a regime for preventive detention that is imposed as a sentence for an offence if the defendant poses a continuing risk to the safety of the public (*Sentencing Act* 2002, s.87). It requires a

⁶⁶ Available at <http://www.slp.wa.gov.au/legislation/statutes.nsf/main_actsf.html> last accessed April 25, 2011.

⁶⁷ Available at <<http://www.legislation.vic.gov.au/>> last accessed April 25, 2011.

⁶⁸ Available at <<http://www.legislation.govt.nz/>> last accessed April 25, 2011.

⁶⁹ *Belcher v. Chief Executive, Department of Corrections* [2007] 1 N.Z.L.R. 507: the New Zealand Court of Appeal expressly rejected an analogy with the Supreme Court's view in *Kansas v. Hendricks* (n.58), that the action taken was a protective order and so not criminal.

⁷⁰ [2009] NZCA 352.

conviction for one of a list of serious sexual or violent offences⁷¹ and a finding by the court that the “the person is likely to commit another qualifying sexual or violent offence” if released from the sentence that would otherwise be imposed.⁷² Amongst the material to be taken into account is medical risk assessment evidence.⁷³ Release from such a sentence is a question for the Parole Board, which applies a risk assessment test.⁷⁴

D. England and Wales

In England and Wales, there is the sexual offences prevention order regime provided for in the *Sexual Offences Act 2003*, ss.104-113.⁷⁵ This allows an order to be made if necessary to protect the public or any particular members of the public “from serious sexual harm”:⁷⁶ this can be done by a court sentencing an offender for various specific sexual or violent offences,⁷⁷ or if an application is made by the police on the basis that an order is necessary and the person is a “qualifying offender”⁷⁸ because of a past conviction. The order sets out the prohibitions placed on the defendant and lasts for a fixed period of at least five years and can be replaced.⁷⁹ Breach of its terms is an offence punishable by up to five years’ imprisonment.⁸⁰

The *Criminal Justice and Immigration Act 2008* introduced a similar regime in relation to violent offenders, namely the violent offender order, under which the police may seek an order from magistrates to control places visited and contact with other people⁸¹ if it is shown that the person is a qualifying offender and there is a risk of further offending. A qualifying offender⁸² is someone who has been sentenced to 12 months’ imprisonment (or made subject to a hospital order) in relation to causing grievous bodily harm,⁸³ manslaughter,

⁷¹ Set out in s.87(5).

⁷² S.87(2)(c).

⁷³ This is one of the procedural requirements set out in s.88.

⁷⁴ S.28 of the *Parole Act 2002* refers to the lack of an “undue risk to the safety of the community or any person” as a precondition for release.

⁷⁵ Available at <www.legislation.gov.uk> last accessed April 25, 2011; see previously the *Crime and Disorder Act 1998*, s.2. There are also provisions relating to the making of risk of sexual harm orders in relation to people thought to be involved in sexualized conduct involving children: *Sexual Offences Act 2003*, ss.123-129.

⁷⁶ S.104(1).

⁷⁷ S.104(2) and (3); the offences are listed in Scheds 3 and 5 to the Act.

⁷⁸ S.104(4) and (5).

⁷⁹ S.107; there are provisions for the variation, renewal or discharge of the order in s.108.

⁸⁰ S.113.

⁸¹ S.102 of the 2008 Act.

⁸² See ss.98 and 99 of the 2008 Act.

⁸³ S.18 or 20 of the *Offences Against the Person Act 1861*.

soliciting murder, or attempting or conspiring to commit murder. The test for the making of an order is that the person “acted in such a way as to make it necessary to make a violent offender order for the purpose of protecting the public from the risk of serious violent harm”.⁸⁴ The order lasts for from two to five years, but can be renewed.⁸⁵ Unlike a sexual offences prevention order, such an order cannot be made by a sentencing court.

In addition, there is a range of other orders designed to prevent criminal behaviour. These include football banning orders in the *Football Spectators Act 1989* (as amended), which can be added to a conviction or sought on a complaint to magistrates; drinking banning orders made under the *Violent Crime Reduction Act 2006*, and the anti-social behaviour order regime, currently regulated by the *Crime and Disorder Act 1998*.⁸⁶

In terms of the standard of proof, the civil standard of proof has been held to be applicable to various orders of a protective or preventive nature: so the High Court held⁸⁷ that a sex offender order, the precursor to the sexual offences prevention order, was a civil order and so involved the civil standard of proof. But, as Lord Bingham C.J. noted, the civil standard of proof was a flexible standard and should be considered to be indistinguishable from the criminal standard in relation to the imposition of such an order. He commented that the strictness of the standard turned on “the seriousness of what has to be proved and the implications of proving those matters”.⁸⁸ In another situation, namely the making of an anti-social behaviour order, which might result in imprisonment for breach and so has obvious analogous value, the criminal standard has been held applicable in relation to the question of whether it had been proved that a person against whom the order was sought had acted in an anti-social manner.⁸⁹ In contrast, the detention of those classified as mentally unwell and therefore posing a risk to themselves or others is decided under the civil standard of proof, which should

⁸⁴ S.101 of the 2008 Act.

⁸⁵ Ss.98 and 103 of the 2008 Act.

⁸⁶ The 1998 Act was heavily amended by the *Anti-social Behaviour Act 2003*. See also the serious crime prevention order regime under the *Serious Crimes Act 2007*: these are designated to be civil, but the Crown Prosecution Service expected the criminal standard of proof to apply in light of the cases discussed in the following paragraph – see the C.P.S. guidance at <[http://www.cps.gov.uk/legal/s_to_u/serious_crime_prevention_orders_\(scpo\)_guidance/](http://www.cps.gov.uk/legal/s_to_u/serious_crime_prevention_orders_(scpo)_guidance/)> last accessed May 9, 2011.

⁸⁷ In *B. v. Chief Constable of Avon and Somerset* [2001] 1 W.L.R. 340 (Queen’s Bench Divisional Court).

⁸⁸ *ibid.*, [30].

⁸⁹ *R. (McCann) v. Crown Court at Manchester* [2002] UKHL 39, [2003] 1 A.C. 787.

be understood as a simple preponderance of evidence that the relevant risk existed.⁹⁰

As in New Zealand, there is in England and Wales provision for the imposition of preventive detention as a sentence of the court (rather than at the end of a sentence). The courts have long had available the option of imposing a discretionary life sentence⁹¹ for those convicted of a serious example of an offence for which that was the maximum sentence available and who presented to the court as posing a risk of further serious offending over a time-scale that could not adequately be assessed by the court, so making them unsuitable for a determinate sentence.⁹² In the *Crime (Sentences) Act* 1997, the legislature created a presumption that the second commission of a specified list of serious offences carrying a life sentence should lead to an automatic life sentence⁹³ unless there were exceptional circumstances that justified avoiding such a sentence.⁹⁴

The regime was amended significantly by the dangerous offender provisions of the *Criminal Justice Act* 2003.⁹⁵ Automatic life sentences were abolished. Instead, conviction of one of a list of sexual or violent offences that carry 10 years' imprisonment or more, and a finding that the defendant posed a significant risk to the public of causing serious harm by committing further sexual or violent offences, required the imposition of either a life sentence, or an indeterminate sentence of "imprisonment for public protection".⁹⁶ Release from an indeterminate sentence depends on the Parole Board

⁹⁰ R. (A.N.) v. Mental Health Review Tribunal [2005] EWCA Civ. 1605, [2006] Q.B. 468; detention under the *Mental Health Act* 1983 requires that the patient have a mental disorder that makes detention for treatment appropriate and necessary: see ss.72 and 73.

⁹¹ As distinct from the mandatory life sentence for murder which still applies in English law.

⁹² See, for example, R. v. Chapman [2000] 1 Cr. App. R. 77 (Court of Appeal).

⁹³ The regime was re-enacted as section 109 of the *Powers of Criminal Courts (Sentencing) Act* 2000 when sentencing provisions were consolidated.

⁹⁴ See R. v. Offer; R. v. McGillard; R. v. McKeown; R. v. Okwuegbunam; R. v. S. [2001] 1 W.L.R. 253 (Court of Appeal) for guidance that exceptional circumstances were met if the defendant demonstrated that he did not present as dangerous despite his offending.

⁹⁵ Pt 12, Ch. 5.

⁹⁶ The regime was amended by the *Criminal Justice and Immigration Act* 2008, to give the judiciary more discretion to avoid an indeterminate sentence when a short determinate sentence would otherwise have been imposed. The rationale for the change appears to be entirely pragmatic: the regime led to a significant number of indeterminate sentences for which the prison system was not equipped, leading to the courts concluding that the introduction of the regime was irrational – see R. (Walker) v. Secretary of State for Justice (Parole Board intervening); R. (James) v. Same (Same intervening) [2008] EWCA Civ. 30, [2008] 1 W.L.R. 1977, a conclusion that was not challenged by the Secretary of State when the case went to the House of Lords (R. (James) v. Secretary of State for Justice (Parole Board intervening); R. (Lee) v. Same (Same intervening); R. (Wells) v. Same (Same intervening) [2009] UKHL 22, [2010] 1 A.C. 553, [3]).

finding that the risk posed by the prisoner no longer requires detention.⁹⁷

V. RISK ASSESSMENT EVIDENCE: THE CASE LAW

A. *Summary of the Context*

The statutory regimes described above are predicated on the courts making predictive judgments that individuals will carry out further criminal offences. As has been noted, this is the very thing that the *Baxstrom* research suggested professional judgment could not do with any significant degree of accuracy. Further, whilst various risk assessment tools have been developed with the aim of securing more reliable predictions of dangerousness, there are features of these tools that demand caution: they are developing, the methodologies are subject to continuing debate, and they all have error rates. More importantly, given that the courts have to make individualised judgments, the actuarial risk assessment tools do not produce the individualised results that they need. These features suggest that courts face significant difficulties in making assessments of future dangerousness with a level of confidence that avoids arbitrariness, the standard that has to be met. However, there are only limited indications in the case law to suggest that the courts are grappling with these problems.

B. *The High Court of Australia*

The Queensland legislation, outlined above, was assessed by Australia's highest court, the High Court of Australia, in *Fardon v. Att.-Gen.*⁹⁸ Kirby J. dissented, concluding that detention on the basis of expert evidence as to a matter that was notoriously difficult to predict, namely future criminality, was too problematic:

“Even with the procedures and criteria adopted, the Act ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed ‘guess’.”⁹⁹

The majority had no particular qualms: for example, Gleeson C.J. accepted that “No doubt, predictions of future danger may be

⁹⁷ *Crime (Sentences) Act 1997*, s.28(6). The prisoner can apply to the board only after serving a minimum period to reflect the seriousness of the offence: thus the sentence is of two parts, one punitive and the other preventive.

⁹⁸ [2004] HCA 46, (2004) 223 C.L.R. 575.

⁹⁹ *ibid.*, [125].

unreliable, but ... they may also be right".¹⁰⁰ His Honour also commented on the alleged vagueness of the test set in the statute of an "unacceptable risk" of further offending: he dismissed the objection, noting that it was a risk of a magnitude that justified an order, and indeed it should not be given a greater degree of definition than it was capable of yielding.¹⁰¹

This case was then taken to the Human Rights Committee of the United Nations, which hears complaints of alleged breaches of the International Covenant on Civil and Political Rights. In *Fardon v. Australia*,¹⁰² the committee found that the detention was arbitrary, and so in breach of Article 9, because Australia had not demonstrated why community supervision was inadequate.¹⁰³ The reasoning process of the committee was that "predicted dangerousness to the community ... is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science." To avoid arbitrariness when requiring courts to make findings as to future criminality, therefore, it was necessary to show why other action short of detention was inadequate.¹⁰⁴

C. The English Court of Appeal

The courts in England and Wales have shown no interest in examining the reliability of the risk assessment process. In *R. v. S., Burt and others*,¹⁰⁵ the Court of Appeal suggested that it would be rare to have an expert report from a psychiatrist to assist in the assessment of dangerousness.¹⁰⁶ This may reflect a more traditional view that sentencing is a judgment based on the offender's antecedents and

¹⁰⁰ *ibid.*, [12]. He relied on *Veen v. R.* [1979] HCA 7, (1979) 143 C.L.R. 458, where a life sentence - which had been imposed on the basis of a finding of dangerousness following a conviction for a serious offence, namely manslaughter on the basis of diminished responsibility - was quashed on appeal by the High Court of Australia and replaced by a determinate term. The prisoner was duly released from that term and killed again: this led to a further conviction for manslaughter on the basis of diminished responsibility (*Veen v. R.* [No 2] [1988] HCA 465, (1988) 164 C.L.R. 465). The implication is that, as courts may get it wrong by not detaining people who turn out to be dangerous, they should err on the side of caution.

¹⁰¹ *ibid.*, at [22].

¹⁰² May 10, 2010, Communication No. 1629/2007, U.N. Doc. CCPR/C/98/D/1629/2007 (2010); see also *Tillman v. Australia*, U.N. Doc. CCPR/C/98/D/1635/2007 (2010), which considered the equivalent legislation in New South Wales.

¹⁰³ It also held that the action taken was a criminal penalty and had been imposed retrospectively, in breach of Art. 15; and it had not been imposed in a manner consistent with a criminal process, and so breached Art. 14 as well.

¹⁰⁴ Para. 7.4(4).

¹⁰⁵ [2005] EWCA Crim. 3616, [2006] 2 Cr.App.R.(S.) 224.

¹⁰⁶ *ibid.*, [101].

circumstances rather than expert evidence. However, the context is that there will almost always be a pre-sentence report by a probation officer containing the outcome from a risk-assessment tool.¹⁰⁷ The court also said that it would rarely be necessary to allow cross-examination of the authors of the pre-sentence report about the assessment made of the seriousness of the risk posed.

“The assessment of risk contained in such a report is, of course, an important factor when the judge is assessing risk but it is not determinative. The judge has to look at all the circumstances of the case and make his assessment in the light of the material before him. It is only likely to be in very rare cases that it will be incumbent on a judge to permit the author of a pre-sentence report to be cross-examined in relation to assessment of seriousness. It is, of course, open to counsel to make submissions about the contents of a report in relation to a defendant’s history of criminal offending and all other material matters.”¹⁰⁸

Further, as noted at the outset of this article, the court has also revealed a total disinterest in assessing the validity of the underlying risk assessment tools: the judgment in *R. v. Boswell*¹⁰⁹ contained the happy assumption that the risk assessment tools were based on valid research. However, at the time of the judgment, the United Kingdom government was engaged in a research project to “improve the validity of the offender assessment system as a predictor of re-offending”,¹¹⁰ which makes clear that the process is very much a work in progress. This, in turn, suggests that a court should be inclined to review whether or not the current state of research is adequate to allow weight to be attached to it and, if so, what weight.

Moreover, it is clear that the tools used had been misinterpreted as to their effect: the report-writer whose views were raised on appeal commented on the risk of further offending and indicated that:

“Actuarial assessment tools used in the preparation of this report take into account Mr Boswell’s extensive range of

¹⁰⁷ Section 156 of the *Criminal Justice Act* 2003 requires a report “unless the court is of the opinion that it is unnecessary” (s.156(4)). Such reports are from probation officers and contain an OASys risk assessment: see Arnott and Creighton, *Parole Board Hearings – Law and Practice* (London, Legal Action Group 2006), ch. 4.19.

¹⁰⁸ *R. v. S., Burt and others* (n.105), [100].

¹⁰⁹ [2007] EWCA Crim. 1587 (n.1).

¹¹⁰ See Ministry of Justice Research Summary 2/09, which summarised changes that were being made to the OASys system as a result of continuing research (available at <www.justice.gov.uk/oasys-research-summary-02-09.pdf> last accessed April 25, 2011).

previous convictions and indicate that his likelihood of re-offending has been assessed to be of a high level.”¹¹¹

This reveals a failure to appreciate the limitations of the actuarial tools, namely that they could not make an individual assessment.

D. The United States Supreme Court

The Supreme Court has also shown limited inclination to engage with the issue. Whilst in *Kansas v. Hendricks*¹¹² the court made plain that statutes such as the sexual predator laws had to ensure that proper procedures and evidentiary standards were applied, it has also accepted that the difficulty of prediction does not mean that it is beyond the function of a court. So, in *Jurek v. Texas*,¹¹³ the court upheld the validity of a provision in the Texas death penalty law to the effect that a finding that a defendant would pose a continuing threat to society from the probability of further criminal acts could be made, as an aggravating factor relevant to the imposition of the death penalty. It was noted that:

“It is, of course, not easy to predict future behaviour. The fact that such a determination is difficult, however, does not mean that it cannot be made.”¹¹⁴

Slobogin and others¹¹⁵ have commented that this authority suggests that any contention that the lack of predictive accuracy in the risk assessment tools means that detention is improper is likely to be rejected, should the question reach the Supreme Court.

E. The New Zealand Court of Appeal

The New Zealand Court of Appeal is one court that has grappled with the question of risk assessment evidence in some detail. This occurred in *R. v. Peta*,¹¹⁶ which revealed a number of the problems that can arise. The case was an appeal against the imposition of an extended supervision order (*ante*, p.94). It was found that an actuarial tool used to assist the risk assessment process had been poorly scored, misinterpreted by the report writer, and then not explained properly to the court.¹¹⁷ The trial judge had given

¹¹¹ *R. v. Boswell* (n.109), [6].

¹¹² n.58. See also *Kansas v. Crane* (n.59).

¹¹³ 428 US 262 (1976).

¹¹⁴ *ibid.*, 274-5. The court noted that the future has to be predicted all the time, for example in decisions as to bail.

¹¹⁵ *Law and the Mental Health System* (5th edn, St Paul, Thompson West, 2009), 695.

¹¹⁶ [2007] NZCA 28, [2007] 2 N.Z.L.R. 627.

¹¹⁷ *ibid.*, [62] *et seq.*, for what the court describes as “disturbing” errors when the expert report was reviewed by a more senior official in the Department of Corrections for the purposes of the appeal.

inadequate reasons, and appeared to rely only on static factors referenced in the expert report rather than giving allowance for any of the dynamic factors capable of change over time. The Court of Appeal therefore heard further evidence, and gave detailed reasons for its conclusions. It found that an order was not required.

The court concluded that "... there are well-validated actuarial measures that can help distinguish between higher and lower risk offenders", and that "[s]uch measures are now augmented by standardised approaches to assessing dynamic risk factors" through another tool used in New Zealand.¹¹⁸ However, it is worth noting that the context was that the prosecution and defence experts agreed that actuarial risk assessments were more accurate than non-structured clinical assessments "despite the limitations of those instruments",¹¹⁹ and they endorsed the use of both static and dynamic factors. Other experts on risk assessment, as has been adverted to above, have concerns about the use of anything other than static factors.

As to the limitations in the risk instruments, the Court of Appeal noted that "risk is contingent on a variety of factors that are difficult or impossible to predict with certainty", and so "the utility of tools such as ASRS [Automated Sexual Recidivism Scale] and SONAR [Sex Offender Needs Assessment Rating] is only realised when they are properly administered, scored and integrated with other relevant information known to relate to the risk of reoffending". Therefore, the other relevant information should be included, as well as any recognisable contingencies that influence the level of risk.¹²⁰

What is clear from this is that the Court of Appeal accepted that there might well be significant reasons to challenge risk assessment evidence. Indeed, the court expressed surprise that it was unusual for counter-evidence to be called by defendants as to the factors relevant to the imposition of an order.¹²¹

F. Outline of Concerns about Risk Assessment Evidence

Whilst it is welcome that the New Zealand Court of Appeal adopted an approach of acceptance of the difficulties that might be present in relation to the process of assessing future dangerousness, it may be asked whether it goes far enough. If evidence is of a nature that it has to be handled with such extreme caution, can it be reliable

¹¹⁸ *ibid.*, [50].

¹¹⁹ *ibid.*, [16]. The two experts were psychologists, and a co-authored article from them was quoted by the court at [48].

¹²⁰ *ibid.*, [51].

¹²¹ *ibid.*, [13].

enough to be admissible, or have more probative value than prejudicial effect?

If those tests are met, there is the secondary issue of the weight to be attached to evidence from risk assessment tools. It is suggested that the nature of these tools affords many grounds for cross-examination of the authors of risk assessment reports; and these authors should include various caveats, so that the court is given a full understanding of the limitations of their evidence. In particular:

- (i) The tool will be based on statistics obtained from studies of particular populations over a period of time.¹²² It may be necessary to return to the original study to find out exactly what the statistics demonstrate. For example, is there any evidence of causation as opposed to correlation (which may hide the fact that another factor is actually causative and so is the factor that needs to be assessed)?
- (ii) Aside from the question of causation, it is also possible that various questions can be raised as to what was studied. For example, the studies will trace the link between various features and an indicator of recidivism, but the adverse outcome measured by the study may have traced arrests or charges or something other than a conviction. If the question for the court is the likelihood of further offending, a tool that is based on statistics of arrests or even charges is of questionable value.
- (iii) The fact that the statistics will relate to a specific population (*e.g.* Canadian prison populations) means that the question will arise as to its validity in relation to the population to which it is applied. This is because there may be different features as between populations that are more likely to be causative of further criminality. For example, the population on which the tool is based may have alcohol abuse problems, or it may not have community support mechanisms or attitudes, or there may be other factors that are relevant to the likelihood of further offending but are specific only to the group studied in the initial research. In other words, there may be questions as to the cultural validity of the application of the tool, or questions as to whether the statistics reflect features of the population studied that are not replicated in the populations to which the tool is applied. There may be a line of questioning available, as to whether the tool being used has been validated for the population of which the individual being assessed is a member.

¹²² See the descriptions of the MacArthur Study or of the VRAG tool (*ante*). Indeed, the study may be a secondary analysis of studies carried out for other purposes.

- (iv) The fact that the original tool was created at a particular time may also mean that it has lost its validity because other features relevant to anti-social behaviour have changed – such as the make-up of society, the existence of policy initiatives, changes in the criminal law, and the numerous factors that have been examined for their impact on criminality.

These are features that go to the validity of the tool and are separate from the professional dispute already mentioned as to whether tools should be entirely actuarial or should incorporate dynamic factors. There are then questions that may arise as to the propriety of the use of the tool, such as the training of the expert – for example as to how the tool's questionnaires should be completed – and the extent to which there is subjectivity in the scoring of the assessment.¹²³ There is also the question of whether the tool has been explained adequately, and whether the court understands that it can only assess the risk presented by a group, rather than the individual in question.¹²⁴

A court is no doubt able to adapt its processes to ensure that all such questions are asked of the witness or witnesses. But it seems evident that the answers given may reveal a situation in which the judge cannot be satisfied that the evidence of the forensic risk assessment tool is reliable enough to be admissible; or its probative value is outweighed by its prejudicial effect on the defendant; or is so weak that, even if admissible, little weight should be given to its results. Courts cannot shrink from making these rulings: that is their function as the guardians of procedural due process. Equally, courts should be ready to accept that, however understandable the desire to prevent harm occurring, its seductive value should not deflect from an acceptance that predicting future criminality is difficult. The need to avoid arbitrariness in detention or in imposing restrictions on individuals – even unpopular ones who have committed past crimes – remains a core function of the courts.

¹²³ For an example, see *Att.-Gen. (Qld.) v. McLean* [2006] QSC 37, where Dutney J. was confronted with evidence from three experts who used the same tools and reached wildly different results. He was also confronted with tests developed for populations outside Australia and not validated for indigenous Australians, the group to which the defendant belonged.

¹²⁴ *R. v. Peta* (n.116), outlined above, indicates clearly that things do go wrong.

A ‘JUST’ OUTCOME: LOSING SIGHT OF THE PURPOSE OF CRIMINAL PROCEDURE

JAMES RICHARDSON Q.C.*

ABSTRACT

This article examines the reforms to criminal procedure which are currently being considered by the New Zealand Parliament. These are compared to developments that have taken place over the last two decades in England and Wales. It is argued that reforms in both jurisdictions constitute an erosion of the common law adversarial system, in the name of political and economic expediency. Areas given particular focus are: case management, defence disclosure obligations, representative charges and sentence indications.

I. PROCEDURE: ... THE DOOR, AND THE ONLY DOOR ...

Criminal trials in common law systems are supposed to be adversarial. This follows from a jurisprudential position, reached over centuries of experience, that the prosecution should bear the burden of proving an allegation of crime, that nobody should be forced to condemn himself out of his own mouth, and that the best way to test the truth of a proposition is by exposing it to an adversarial process in which the evidence to support it is subjected to cross-examination. Whilst some would take issue with Wigmore’s claim that cross-examination is “beyond doubt the greatest legal engine ever invented for the discovery of the truth”,¹ there is no doubting the power of cross-examination to discover and reveal untruth. The role of the judge in an adversarial system is to facilitate this process and to ensure that it is conducted fairly and in accordance with the substantive legal rules, the rules of evidence and the procedural rules. As to the latter, the sole and proper purpose of rules of criminal procedure is to provide a framework for a fair means of delivering a verdict in relation to an allegation of criminality. They are “the door, and the only door, to make real what is laid down by substantive law.”² It is imperative, therefore, that procedural decisions are made on their own merits and

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¹ J.H. Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd edn, Boston, Little Brown 1940), para. 1367.

² Karl Llewellyn, *The Bramble Bush* (New York, Oxford University Press 2008), 11.

without taking a preliminary view as to the truth of the allegation, which would be to put the cart before the horse.

It is trite that promoting or even defending the rights of those accused of crime is not a vote-winning stance for a politician, whereas being “tough on crime” and espousing the need for a “re-balancing of the criminal justice system” generates political popularity and the approval of the popular media. The *Criminal Procedure (Reform and Modernisation) Bill* currently before the New Zealand Parliament, examined in this article, is a product of this mindset. It is also the mindset that has dominated criminal procedure reform in England and Wales, particularly since 1993, when Michael Howard became Home Secretary and turned his back on the cross-party approach to criminal justice, adopting the mantra that “prison works”. It is the contention of this article that since 1993, and at an accelerating pace, the perspective that has informed all reforms to the rules of criminal evidence and procedure has been that the great majority of those accused of crime are guilty of what is alleged or something similar to what is alleged, that too many of them are getting away with it, and that the rules need to be changed with a view to securing a higher conviction rate. Principle and justice have been sacrificed at the altar of expediency. It will be suggested that the senior judiciary in England and Wales have, on the whole, not merely connived at this trend, but have endorsed it enthusiastically; and it is feared that New Zealand will suffer a similar fate if the bill is passed in its current form.

The primary casualty has been the principle that it is for the prosecution to prove guilt unaided by the defendant. It will be suggested that there has been a perceptible movement away from the traditional adversarial model in England and Wales towards a more inquisitorial form of trial, which has been dressed up with the anti-septic label of “case management”, that the authors of the English and Welsh criminal procedure rules lost sight of the proper purpose of such rules, and that, in consequence, a culture has emerged according to which it is acceptable to subordinate procedure to substance. The topics of representative charges, sentence indications and appeal arrangements will be drawn on to illustrate how justice has been made to bow to expediency.

The article draws attention to the similarities between what has happened in England and Wales and what is happening, or is about to happen, in New Zealand; and it argues that many of the familiar complaints laid against the criminal justice system of either jurisdiction had, or have, little to do with the state of the statute book, and more to do with the quality of case preparation, and that a climate in which non-compliance with procedural rules is regularly indulged by the courts generates a vicious circle of declining standards.

The New Zealand bill was introduced by Justice Minister, Simon Power, in November, 2010, and is a major piece of legislation by any standard, running to 443 sections, and having seven schedules with 200 plus pages of textual amendments to existing legislation. The author of this article assisted the New Zealand Bar Association with its submissions in relation to the bill and gave evidence on behalf of the association to the Justice and Electoral Select Committee of the House of Representatives. Numerous other interested parties in New Zealand made submissions criticising the bill, the most prominent being Dame Sian Elias, the Chief Justice of New Zealand, who raised several of the concerns that are developed in this article. In England and Wales, the reforms are in place. In New Zealand, they are not yet a done deal. At least one New Zealander has pondered on the question: “If Britain were to jump off a bridge...”³. New Zealand’s parliamentarians may wish to reflect on this before signing off on a bill which has been said to be a bill for the next 50 years.⁴

II. THE NEW ZEALAND BILL

A. The mischief

The preamble to the New Zealand Law Commission’s commentary to their Bill Plan (draft bill) began:

“Over the last 10 to 20 years, there has been building criticism of criminal procedure in New Zealand. This criticism has focussed on ‘needless delay’ and inefficiency of court processes, and an out-of-date and unnecessarily complex legislative framework, complicated by numerous piecemeal amendments over many years.”⁵

Under the heading, “Aims of the proposed reforms”, it then lists the particular problems the bill seeks to address: repeated adjournments, unnecessary court appearances to deal with matters that should have been addressed by the parties out of court, late guilty pleas that result in inefficient use of court and judge time, trials that fail to proceed on their scheduled date, inadequate incentives and sanctions to ensure that the parties progress cases as they should, long delays before the final disposal of cases, a trial system in which relatively minor cases

³ Graeme Edgeler, ‘If Britain Jumped off a Bridge...’, Leagle Beagle, June 10, 2008, <<http://publicaddress.net/legalbeagle/if-britain-jumped-off-a-bridge/>>, accessed May 13, 2011.

⁴ R.J. Johnson, Chief District Court Judge, ‘Criminal Procedure (Reform and Modernisation) Bill: Submission of the District Court Judges’ (submission to the Justice and Electoral Select Committee) (February 18, 2011), para. 2.5.

⁵ New Zealand Law Commission and Ministry of Justice, *Criminal Procedure (Simplification) Project: Reforming Criminal Procedure* (December 21, 2009), para. 1.

may be tried by jury, barriers to the use of modern technologies and an excessively paper-based process, and an excessively complex and outdated legislative framework. It is noteworthy that of all these complaints, apart from the generalised one relating to the legislative framework, only one (that relating to jury trial for minor offences) is directly related to the current state of the statute book. All the other complaints boil down to poor case preparation. Improved case preparation does not require drastic revision of the rules of criminal procedure.

The paper continues (para. 6) by setting out what the reforms are intended to ensure, *viz.* that where a defendant intends to plead guilty, the plea is entered as soon as practicable, that court hearings are only held when a judicial decision or other judicial intervention is required, that better information is exchanged between the parties with out-of-court discussions becoming the standard and expected way of progressing a case, that incentives and sanctions are in place to promote compliance with procedures by all parties, including counsel, that unnecessary adjournments and the number of cases that fall over close to trial are minimised, that all pre-trial matters are adequately dealt with before trial, that there is proper focus on the issues in dispute, that jury trials are reserved only for the most serious cases and that modern technologies are appropriately utilised.

B. An overview

The initial impression is of a bill that is poorly constructed, overly ambitious in the breadth of its reach, yet defective to the extent that it purports to be a code of criminal procedure because it omits important subjects which ought to be in the bill, the most obvious of which are the legislative provisions for prosecution disclosure (currently to be found in the *Criminal Disclosure Act 2008*). If there are to be provisions for defence disclosure, then surely they should be, and should be seen to be, tied to the legislation regulating disclosure by the prosecution, as they are in England and Wales.⁶ As to the construction of the bill, Part 5 may be headed “General provisions”, but it comprises a veritable hotchpotch of clauses dealing with a huge range of wholly unrelated issues, some of which are pre-trial issues (witness summonses, service of documents), some of which are evidential issues (special provisions for taking evidence), many of which are trial issues (why not in Part 4 (“Trial”)?) and some of which are post-trial issues (proving previous convictions on sentencing, correction of erroneous sentence).

⁶ *Criminal Procedure and Investigations Act 1996*, Pts I and II.

The explanatory note issued with the Bill begins by declaring that its purpose is “to simplify criminal procedure and to provide an enduring legislative framework that ensures the fair conduct of criminal prosecutions ..., reduces unnecessary delay and inefficiency of court processes, avoids unnecessary stress to victims, witnesses, jurors and others involved in criminal processes, eliminates unnecessary complexity in the legislation governing criminal procedure, addresses shortcomings in the legislative framework arising from piecemeal amendments over many years, and enables courts to adopt new (and current) information technologies, as appropriate.”⁷ These are laudable aims, and the reference to “shortcomings in the legislative framework arising from piecemeal legislation over many years” will undoubtedly strike a chord with criminal practitioners in England and Wales, but, to the outsider at least, it is difficult to believe that this bill, with its shortcomings and the bewildering complexity of the arrangements for mode of trial and for appeals, will do anything to simplify criminal procedure, whilst it will surely provide a rich vein for litigation.

This article is not concerned to examine the provisions relating to mode of trial. In summary, however, the bill provides for four categories of offence (in reality five because one category, category 3, is sub-divided into “protocol offences” and non-protocol offences to which different procedures apply) and for trial by jury in one of two courts, a district court or the High Court. To the practitioner from England and Wales, these arrangements seem unnecessarily complex, and they are matched by appellate arrangements of corresponding complexity. The most controversial provision in relation to trial arrangements is that which removes the right to elect trial by jury for offences that carry no more than three years’ imprisonment on conviction, and which will require amendment of the *New Zealand Bill of Rights Act* 1990.

III. ADVERSARIAL OR INQUISITORIAL?

A. Case management

England and Wales

In the commentary to the Bill Plan, the New Zealand Law Commission declare that “(e)ffective case management is essential to achieving many of the aims of our reforms”.⁸ This will sound all too familiar to practitioners in England and Wales where “case management” has been the watchword of the criminal courts since

⁷ *Criminal Procedure (Reform and Modernisation) Bill*, p.1.

⁸ New Zealand Law Commission and Ministry of Justice (n.5), para. 101.

the *Criminal Procedure Rules* 2005⁹ (subsequently replaced by the *Criminal Procedure Rules* 2010)¹⁰ provided that it was the duty of the court to “further the overriding objective by actively managing the case” (r.3.2), and it was the duty of the parties “actively [to] assist the court in fulfilling its duty under rule 3.2” (r.3.3). Both the concept of “case management” and of an “overriding objective” had been lifted from the *Civil Procedure Rules* 1998,¹¹ which had been made with the avowed intent of reducing costs and improving efficiency in the civil justice system. Twelve years on, there is a widespread belief that far from reducing cost, delay and complexity, the 1998 rules have had exactly the opposite effect,¹² but back at the time of the drafting of the original criminal procedure rules, the aura of Lord Woolf still held sway.¹³ Whilst borrowing two key concepts from the civil rules, the criminal rules went further in two vital respects. The first was the imposition of a duty of active case management on the court for the purposes of furthering the overriding objective. The second was the manner in which the overriding objective was elaborated. In the civil rules, the rules were proclaimed to have the “overriding objective of enabling the court to deal with cases justly” (r.1.1(1)). Rule 1.1(2) then stipulated that dealing with cases justly included such matters as ensuring that the parties are on an equal footing and saving expense. The criminal rules similarly declared the overriding objective of the rules to be that “criminal cases be dealt with justly”, but, critically, went on to state that dealing with cases justly includes “(a) acquitting the innocent and convicting the guilty”.

Confusing procedure with outcomes

So what is the criticism of such rules? Making a rule that cases should be dealt with justly sounds unexceptionable, but hardly needs saying. However, it is submitted that the inclusion of “the acquittal of the innocent and the conviction of the guilty” as an aspect of the overriding objective has no place in a criminal procedure code. Apart from the fact that there is no method of measuring how successful the rules are in achieving their objective of acquitting the innocent and convicting the guilty, such an objective, backed up by a duty on the court to further it, and by a duty on all parties to assist

⁹ S.I. 2005 No. 384.

¹⁰ S.I. 2010 No. 60.

¹¹ S.I. 1998 No. 3132.

¹² Michael Zander, ‘Zander on Woolf: More harm than good?’ [2009] 159 N.L.J. 367; Lawrence West, ‘Have the Woolf reforms worked?’ *The Times*, April 9, 2009.

¹³ The civil rules of 1998 had their origin in a review of the civil justice system by Lord Woolf, who was then Master of the Rolls (the head of the civil judiciary). The reforms are widely known as the “Woolf reforms”. By the time of the first set of criminal procedure rules, Lord Woolf had become Lord Chief Justice.

the court to further it, is fundamentally inconsistent with an adversarial system of criminal justice. It effectively obliges the court to abandon its position of impartial arbiter ensuring that the trial is conducted according to a set of rules for which it has no responsibility, and instead to descend into the arena and take an active role in having the case conducted by the parties in such a manner as will produce a true outcome. Such is the role of the judge in an inquisitorial system.

Apart from being pointless (because its achievement is incapable of being measured), making the conviction of the guilty and the acquittal of the innocent an aspect of the overriding objective and imposing a duty on all parties to further that overriding objective means (a) that any guilty defendant who pleads not guilty is in breach of his duty under the rules, and (b) that any counsel who represents a defendant who admits his guilt would be in breach of the rules if he were to advise his client that he is entitled to put the prosecution to proof. He would also be in flagrant breach of the rules if he were then to make a submission at the conclusion of the prosecution case that there is no case to answer. A further consideration is how a judge is to further this aspect of the overriding objective when ruling on procedural matters, on the admissibility of evidence and, particularly, when exercising a discretion. The reality is that many judges see it as their responsibility to take a view as to the merits and to rule accordingly; but this is to assume the very thing that the jury are there to decide. In this context, Megarry J.'s dictum in *John v. Rees*¹⁴ constitutes a salutary reminder:

“As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases, which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.”¹⁵

Whilst the first-instance judiciary in England and Wales are taking a view as to the merits of the case in their conduct of a trial, and justifying this by the need to further the overriding objective, this attitude is matched by that of the appellate judiciary who, again by reference to the overriding objective, waste no opportunity to disparage the taking of procedural points, and frequently adopt pejorative expressions such as “ambush defence”.¹⁶ Their obsession

¹⁴ [1970] Ch. 345 (High Court (Chancery Division)).

¹⁵ *ibid.*, 402.

¹⁶ R. v. Gleeson [2003] EWCA Crim. 3357, [2004] 1 Cr.App.R. 406, [35] *per* Auld L.J.; R. (D.P.P.) v. Chorley JJ. [2006] EWHC 1795 (Admin.), [26]-[28] *per* Thomas L.J.;

with the duty of the court to manage a case so as to further the overriding objective has blinded them to the true purpose of criminal procedure rules, which was clearly expressed by Kirby P. in *R. v. Birlut*¹⁷:

“Criminal procedure in our tradition is generally strict. The peril of liberty and the risk to reputation have imposed on criminal trials over the centuries a rigorous discipline so that procedural requirements are strictly complied with in the defence of the regularity of criminal process and the acceptability of its outcome. Rules of practical commonsense and flexibility, which have become increasingly acceptable in civil trials, must be viewed with reservation and care in the context of criminal trials. The fact that a point may be ‘technical’ is irrelevant. The strict application of the rule of law in criminal proceedings is the essence of the way in which, in our legal system, courts have defended due process. The comment that the argument raised is ‘unmeritorious’ is also beside the point: cf. Meagher J.A. in *R. v. Perry* (1993) 29 N.S.W.L.R. 589 at 594. If the matter raised has legal merit, that is enough.”¹⁸

The New Zealand case management proposals

The New Zealand proposals have beyond question borrowed the concept of “case management” from England and Wales, albeit there are differences of detail, the most obvious being that the New Zealand bill places the primary responsibility for pre-trial case management on the parties rather than the court. Clause 52(1) provides that if the defendant pleads not guilty to a category 2, 3 or 4 offence (the three most serious categories), the court must set a date for the review of the case and adjourn the proceeding to that date “for case management by the parties.” Sub-clause (3)(a) stipulates that if the defendant is represented by a lawyer, the prosecutor and defence counsel must “engage in case management discussions to ascertain whether the proceeding will proceed to trial and, if so, making [sic] any arrangements necessary to its just and expeditious resolution”.

As in England and Wales, this proposal, which is very much at the heart of the bill’s procedural proposals, confuses procedure with outcome. What does “just” mean in this context? The reality is that

Malcolm v. D.P.P. [2007] EWHC 363 (Admin.), [2007] 1 W.L.R. 1230, [31] per Stanley Burnton J.; *Writtle v. D.P.P.* ([2009] EWHC 236 (Admin.)), [2009] R.T.R. 367, [15] per Simon J.; *R. v. Penner* [2010] EWCA Crim. 1155, [18]-[19] per Thomas L.J.

¹⁷ (1995) 39 N.S.W.L.R. 1 (New South Wales Court of Criminal Appeal), 5; see also *R. v. Clarke and McDaid* (n.42).

¹⁸ *R. v. Birlut*, *ibid.*, 5.

the prosecution and the defence will be asserting diametrically opposite outcomes, so how can they agree on arrangements for a “just” resolution? Or it may even be the case that the defendant admits his guilt to his lawyer, but is advised that the prosecution do not have the evidence to prove it, and that the defendant’s instructions are limited to putting the prosecution to proof. What is the defence lawyer to do if he is bound to make arrangements for the “just” disposal of the case? Requiring the parties to make arrangements for the expeditious disposal of a case is unobjectionable, but requiring them to make arrangements for the “just” disposal of the case begs the question. Whilst substituting “fair” would not be open to the same objection, this should not be an obligation of the parties. The premise should be that the rules provide a framework for the fair resolution of criminal cases.

B. Defence disclosure

The bill, if enacted, will introduce into New Zealand a duty on the defence to identify issues in dispute, with sanctions for failure to comply. Such a system exists in England and Wales, and has its origins in the alibi notice provisions of the *Criminal Justice Act* 1967. Apart from requirements relating to the giving of notice in relation to expert evidence, the principal steps on the way to the current regime have been: the *Criminal Justice Act* 1987, which made special provision in relation to cases of serious or complex fraud, and allowed the judge to order the giving of a defence statement once the prosecution had nailed their colours to the mast by serving their evidence and their statement of case; the *Criminal Procedure and Investigations Act* 1996, which introduced compulsory defence disclosure across the board in cases that were to be tried on indictment, the duty to make disclosure being triggered by the prosecution complying with their own disclosure duties which were set out in the same Act; the *Criminal Justice Act* 2003, which amended the disclosure provisions of the 1996 Act so as further to particularise the duties of the defence and to impose a duty to give notice of any witnesses the defence intended to call other than alibi witnesses (who were already covered by earlier legislation); and the *Criminal Justice and Immigration Act* 2008, which extended yet further the 1996 Act requirements to include a duty to set out particulars of any matters of fact on which the defendant intends to rely in his defence. These duties, as gradually extended, were to be enforced by section 11 of the Act (as amended over the years), which allowed for the making of adverse comment by the court or another party on a failure to comply with the statutory duties, and for the drawing of adverse inferences from such failure by the court or the jury.

There are three elements to the duty contained in the New Zealand proposals. First, the defence must give notice, as part of prescribed case management processes, of the issues that are in dispute (cl.64), and leave of the court must be obtained to give notice of issues that are in dispute outside of those processes (cl.65). Secondly, at the start of a jury trial, both prosecution and defence must give an opening statement (cl.110). The defence's opening statement is "for the purposes of identifying any issues of the kind described in section 64(1)" (cl.110(2)). Thirdly, the fact-finder may draw an inference about the defendant's guilt from a failure to identify the issues in dispute (cl.114).

The introduction of a defence disclosure regime was considered in detail in a discussion document issued by the Law Commission and the Ministry of Justice in May, 2009.¹⁹ A reading of this document would suggest to the uninitiated that it is the failure of the defence to identify the matters in issue at an early stage of the proceedings that is the source of all New Zealand's ills. Assertions such as, "Unless the defence identifies before trial the stance it intends to take, the case must progress as if everything is disputed." and "A failure to identify the issues in dispute leads to trials that are unnecessarily complex. In addition to increasing the time required to conduct a trial, this unnecessary complexity makes the fact-finder's job ... more difficult."²⁰ are tendentious and misleading. What the authors of the document overlook is that the best way to flush out the defence is to prepare the prosecution case properly. Later in the document, it is said that "some defence counsel ... identify the issues in dispute before the hearing or trial and agree to the admission of evidence without proof that is not relevant to those issues. This paper merely proposes that this good practice becomes uniform practice."²¹ This is disingenuous. Counsel, senior or otherwise, who follow this practice do not do so out of a sense of civic duty to keep the wheels of justice turning and costs down. They do it because, in their judgment, it is in their client's interests to do so. They choose to make a clean breast of their case because they recognise that the prosecution do have the evidence to prove all the elements of the offence and they decide to make a virtue of the fact that they are being "up front" about the issue in the case.

¹⁹ New Zealand Law Commission and Ministry of Justice, *Discussion Document: Identification of the issues in dispute* (May, 2009).

²⁰ *ibid.*, paras 2 and 3.

²¹ *ibid.*, para. 7.

Notification of issues in dispute

Clause 64 (“Defendant must notify issues in dispute”) of the bill, taken together with clauses 110(2) (duty on defendant to make opening statement before any evidence adduced as to the matters in issue), and 112 to 114 (comment on failure to identify issues, and drawing of inferences from such failure), is probably the single most controversial clause in the bill. Clause 64(1) stands the adversarial criminal process on its head. It requires the defendant, before trial, to give notice “(a) of any particular elements of the offence that the defendant contends cannot be proved, and (b) ... of any particular defence, justification, exception, exemption, proviso or excuse on which the defendant intends to rely.” While there may be some justification for a provision along the lines of sub-clause (b), paragraph (a) is indefensible. Apart from the obvious scope for argument as to what the elements of any particular offence may comprise, it is not for the defendant to say what can or cannot be proved. It is for the prosecution to identify what has to be proved and to set out to prove it; and for the court (judge or jury) to say whether the various elements that have to be proved have indeed been proved. What if the defendant denies identity? Does this mean that the prosecution are spared the necessity of proving that the offence occurred? If the defendant wasn’t there, how is he to know whether the offence took place as alleged?

Clause 67 provides that, for the purposes of clauses 106 and 112 to 114, a failure to notify adequately the issues in dispute may include, (a) failing to give notice under clause 64, (b) giving notice under clause 64 that all issues are in dispute without identifying particular issues in dispute, and (c) notifying issues in dispute that, if the defendant’s contention in relation to each were to be accepted, would be mutually contradictory. Paragraph (b) raises in acute form the case of the defendant who simply wishes to put the prosecution to proof (a fundamental right in common law jurisprudence). Under clause 64, he can give notice that he contends that “all the elements of the offence” cannot be proved; but it seems that, under clause 67, this is potentially to be taken against him.

In relation to these two clauses (64 and 67), it is also to be noted that there is a mis-match in the drafting. Clause 64 refers to matters that the defendant contends “cannot be proved”, whereas clause 67 (like all the other relevant provisions of the bill) refers to the identification of matters that are “in dispute”. The draftsman singularly fails to appreciate the fundamental difference between a matter that is not admitted (that any offence took place) and a matter that is in dispute (that the defendant was responsible for the alleged offence).

Inferences from failure to notify adequately issues in dispute

With the development, in England and Wales, of a comprehensive defence disclosure regime, came provisions for the drawing of adverse inferences by the court or the jury from: (i) a failure to mention when interviewed a fact subsequently relied on by the defendant where, having regard to the circumstances existing at the time, the accused could reasonably have been expected to have mentioned the fact in interview;²² (ii) a failure or refusal by the accused to account for an object, substance or mark found on or about his person upon arrest and when asked to do so by a police officer;²³ (iii) a failure or refusal by the accused to account for his presence in a particular place at or about the time the offence for which he was arrested is alleged to have been committed when asked to do so by a police officer;²⁴ or (iv) a failure to give evidence.²⁵

Likewise, clause 106 of the New Zealand bill would allow the trial judge in a judge-alone trial to draw such inferences as appear proper from a failure by the defence to notify adequately the issues in dispute. A corresponding provision is contained in clause 114 for jury trials. The court will no doubt infer the existence of any element of the offence charged that the defence did not at the due time notify as being in dispute. This puts the defendant who wishes to put the prosecution to proof in a particularly invidious position. Notifying all elements of the offence as being in dispute will be held against him. Notifying no elements as being in dispute will equally be held against him, even if the court does not go directly to a conclusion as to guilt.

Requiring defence to be put before the conclusion of the prosecution case

Clause 110(2) would oblige the defendant to make an opening statement after the opening statement by the prosecutor and before any evidence is adduced, for the purpose of identifying any issues of the kind described in clause 64(1). It, also, is indefensible in an adversarial system. It violates the defendant's absolute right to say nothing and put the prosecution to proof. This is one of the most fundamental aspects of common law criminal justice, about which countless thousands of juries have been directed by judges. The authors of the bill seem to have no appreciation of this bedrock principle. Sub-clause (3) is almost as startling. By conferring a discretion on the judge to direct that defence evidence should be

²² *Criminal Justice and Public Order Act 1994*, s.34.

²³ *ibid.*, s.36.

²⁴ *ibid.*, s.37.

²⁵ *ibid.*, s.35.

given before the conclusion of the prosecution case, it departs from the rule that the prosecution must call any evidence upon which they rely before the defence need say anything.

Principled objections to a duty of defence disclosure

The New Zealand Law Commission and Ministry of Justice's discussion document contains an attempt to head off any objections to their proposals.²⁶ These are anticipated to be that giving effect to them will undermine the right to silence and the privilege against self-incrimination, the burden of proof and the adversarial process. All these issues are, of course, intimately related. As to the right to silence, it is asserted that this is not a right to literal and continuous silence. The right, according to the Law Commission and the Ministry of Justice, is no more than a right not to answer questions in interview and not to give evidence at trial. However, this misstates the right at common law, which is indeed a right to literal silence prior to trial and at trial. Requiring of a defendant any form of statement prior to trial or at trial, whether from his own lips or through his lawyer, is an invasion of that right. As to the privilege against self-incrimination, it is said that the defendant is not being compelled to say anything incriminating. This is naïve. Compelling a defendant to identify that which is in dispute inevitably involves forcing him to admit that which is not in dispute. And what of the defendant who does not "dispute" anything, but who does not admit anything, and who seeks merely to put the prosecution to proof? What is he to say at the outset of the trial? He cannot say himself or through his counsel, "I dispute that I was the person who murdered the deceased." because he has no right to mislead the court, so he will be reduced to saying, "I dispute that the prosecution have the evidence to prove that I am guilty of the murder with which I am charged." Every judge will know instantly what such a statement means; and it will only take a jury a split second to work out its implications.

In relation to the burden of proof, the conventional view is that under the common law, it is for the prosecution to adduce evidence to establish all the elements of the offence charged - it is for them to show why the defendant is guilty. The imposition of an obligation on the defendant to say why he is not guilty immediately eases the burden on the prosecution. They will inevitably seek admissions of fact in relation to elements of the offence that have not been flagged as being in issue, thus sparing themselves the necessity of obtaining evidence of matters that they might have had difficulty proving had

²⁶ New Zealand Law Commission and Ministry of Justice (n.19), paras 51-64.

they been required to do so. The Law Commission and the Ministry of Justice actually concede that a consequence of their proposals will be that the defence will be required on occasion to point out the defects in the prosecution case; but they say that “the wider interests of truth and justice arguably require that the prosecution have an opportunity to rectify its approach if that can occur without misconduct or abuse of process.”²⁷ Principle apart, the practical objection is that such an approach simply encourages slackness and incompetence on the part of prosecutors, who expect the failings in their preparation to be pointed out to them by the defence and to be indulged by the judiciary.

As to the adversarial process, a system of pre-trial disclosure by the defendant that is supervised by the judge with sanctions in the form of adverse inferences for non-compliance is, of course, completely alien to an adversarial process whereunder the accuser comes to court and makes his case, without help from the court or the defender, with the defender having an opportunity to answer his case if and when he has done so. The establishment in England and Wales are in denial about this,²⁸ but the truth of this proposition has rarely been better made than by Sopinka J. when delivering the majority judgment in the Supreme Court of Canada in *R. v. Noble*.²⁹ It deserves to be quoted at length:

“The right to silence is based on society’s distaste for compelling a person to incriminate him- or herself with his or her own words ... [T]he use of silence to help establish guilt beyond a reasonable doubt is contrary to the rationale behind the right to silence. Just as a person’s words should not be conscripted and used against him or her by the state, it is equally inimical to the dignity of the accused to use his or her silence to assist in grounding a belief in guilt beyond a reasonable doubt. To use silence in this manner is to treat it as communicative evidence of guilt. To illustrate this point, suppose an accused did commit the offence for which he was charged. If he testifies and is truthful, he will be found guilty as the result of what he said. If he does not testify and is found guilty in part because of his silence, he is found guilty

²⁷ *ibid.*, para. 59.

²⁸ See Sir Robin Auld, *Review of the Criminal Courts of England and Wales: Report* (London, TSO 2001); a speech given by Sir Igor Judge shortly before he became Lord Chief Justice at the University of Sydney in August, 2007, ‘The Criminal Justice System in England and Wales - Greater Efficiency in the Criminal Justice System, Time for Change?’ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/sydney_timeforchange_0807.pdf> accessed May 11, 2011; and His Honour Judge Roderick Denyer Q.C. (a member of the Criminal Procedure Rules Committee), ‘The changing role of the judge in the criminal process’ (2010) 14 E. & P. 96.

²⁹ [1997] 1 S.C.R. 874.

because of what he did not say. No matter what the non-perjuring accused decides, communicative evidence emanating from the accused is used against him. The failure to testify tends to place the accused in the same position as if he had testified and admitted his guilt. In my view, this is tantamount to conscription of self-incriminating communicative evidence and is contrary to the underlying purpose of the right to silence. In order to respect the dignity of the accused, the silence of the accused should not be used as a piece of evidence against him or her. ...

If silence may be used against the accused in establishing guilt, part of the burden of proof has shifted to the accused. In a situation where the accused exercises his or her right to silence at trial, the Crown need only prove the case to some point short of beyond a reasonable doubt, and the failure to testify takes it over the threshold. The presumption of innocence, however, indicates that it is not incumbent on the accused to present any evidence at all, rather it is for the Crown to prove him or her guilty. Thus, in order for the burden of proof to remain with the Crown ... the silence of the accused should not be used against him or her in building the case for guilt".³⁰

Many of the submissions on the bill voice opposition to these proposals. These include the New Zealand Bar Association, the Criminal Bar Association, the Wellington Criminal Bar Association and the Auckland District Law Society. Of most interest and significance, however, was the submission from Dame Sian Elias, made on behalf of herself, the President of the Court of Appeal and the Chief High Court Judge. One of the matters she singled out for comment was:

"the requirement for notification of issues in dispute in advance of trial and also at the commencement of trial, together with related provisions providing for sanctions in the event of non-compliance both at sentence and by way of costs orders against defendants and their counsel. I have previously recorded my grave concern that these provisions are contrary to long-standing principle, being inconsistent with a defendant's right to have the prosecution prove its case beyond reasonable doubt, not being obliged to assist the prosecution by volunteering information. I appreciate that some defendants and counsel are guilty of abusing the system but, on balance, [we are] not persuaded that this provides good reason for the departure from basic principle which is

³⁰ *ibid.*, [75], [76].

involved in any requirement for advance disclosure of an intended defence.”³¹

C. Sanctions

Apart from the provision for the drawing of adverse inferences from a failure to comply with the duty to disclose matters in issue, the New Zealand bill backs up its case management and defence disclosure proposals with a mixture of carrot and stick. As to stick, the bill provides for sanctions to be imposed by the court both against defendants themselves, and their legal representatives. Two forms of sanction are available: ordering a party to pay costs, and increasing the defendant’s sentence. As to carrot, the bill allows for co-operation to be taken into account as mitigation.

Clause 361 permits the court to order the defendant, the defendant’s lawyer or the prosecutor to pay such sum as is just and reasonable in the light of the costs incurred if they have failed without reasonable excuse to comply with a requirement imposed by or under the bill or the *Criminal Disclosure Act 2008*. This provision no doubt owes its origin to the wasted costs jurisdiction in England and Wales, but it goes far beyond it, in that a “wasted costs order” in England and Wales depends on a finding not only that costs have been wasted, but also that this was the result of an “improper, unreasonable or negligent act or omission”.³² Is it seriously being suggested that the court is not just to try a case but is to discipline the parties for the conduct of their cases? The threat of orders in the nature of fines will intimidate legal representatives, undermine legal professional privilege, create distrust between bench and bar, imperil the confidence that a defendant should have in his legal representative, create conflicts of interest (will defence counsel be doing his best for his client if he has one eye looking out for any costs orders?) and give rise to satellite litigation.

Clause 431 amends the *Sentencing Act 2002* so as to require a sentencing judge to take into account as aggravating or mitigating factors (to the extent applicable) the failure of the offender (or of his lawyer arising out of his instructions) or the prosecution to comply with a procedural requirement or positive steps taken by the offender (over and above mere compliance) to expedite or reduce the cost of proceedings. This is an entirely novel provision which has no precedent in England and Wales, and raises the spectre of the defendant who pleads guilty having the appropriate sentence reduced on that account whilst the defendant convicted after trial is exposed

³¹ Sian Elias C.J., ‘*Criminal Procedure (Reform and Modernisation) Bill*’ (submissions to the Justice and Electoral Select Committee) (February 25, 2011).

³² *Prosecution of Offences Act 1985*, s.19A.

to the risk that the appropriate sentence will be increased on that account.

Given the numerous objections to the defence disclosure and case management regime contained in the bill, outlined above, it is submitted that such a sanctions regime will result in injustice to defendants. Unsurprisingly, these clauses have met with as much opposition as those relating to the disclosure of issues by the defence. The issues are, of course, closely linked, in that the sanctions are plainly intended to make the disclosure regime effective. Typical of many responses was the Chief Justice's. She said that in part her objections to the sanctions regime had a similar basis to her objection to the disclosure regime:

“... but I should also record that the view of the judiciary is that the sanctions are likely to prove to be impracticable to apply in practice because of uncertainty about whether the abuse of the system is the fault of the defendant or of counsel. Judges will of course be inhibited in their inquiries by the existence of privilege for communications between counsel and client. All-in-all, then, the sanctions provisions are likely, except in comparatively rare cases, to be ineffective.”³³

IV. JUSTICE OR EXPEDIENCY?

A. Representative charges

New Zealand

The bill provides for “representative charges” to be preferred against a defendant in certain circumstances. These are known as “sample counts” in England and Wales, where they were introduced in 2004, but will be referred to as “representative charges” hereafter. The premise behind representative charges is that the verdict is likely to be the same in respect of all the charges, and that, therefore, in order to economise on time and money, it should be permissible for the remainder of the allegations to be tried by a judge alone (the England and Wales model) or not be tried at all (the New Zealand proposal). However, the drafting of the New Zealand measure leaves open so many issues that it will be unworkable in practice; and it is submitted that representative charges are unnecessary and unjust in principle.

Clause 17 provides for a representative charge if multiple offences of the same type are alleged, and either (a) the offences are alleged to have been committed in similar circumstances over a period of time and the nature and circumstances of the offences are such that the

³³ n.31.

complainant cannot reasonably be expected to particularise dates or other details of the offences, or (b) the offences are alleged to have been committed in similar circumstances such that it is likely that the same plea would be entered by the defendant in relation to all the offences if they were charged separately and, because of the number of offences alleged, if the offences were charged separately but tried together it would be unduly difficult for the court to manage the separate charges.

A mere reading of this provision gives rise to a number of issues. First, how is the defendant to know that a charge is a representative charge? Secondly, even if the charge is somehow flagged as being “representative”, how is the defendant or court to know what it is supposed to be representative of? Thirdly, there appears to be no provision as to how a representative charge is to be tried. Fourthly, there appears to be no provision as to how sentence is to be determined in the event of a conviction.

The “problems” of multiple offences are gravely exaggerated, especially in an era of computerisation when producing an indictment or charge sheet with multiple counts creates little difficulty. In this context, it should be borne in mind that the greater the similarity between the different offences, the more straightforward it is to produce a multi-count indictment. As to the first case provided for by clause 17, this is presumably intended to deal typically with an allegation by, say, a child that she was sexually abused by her step-father over a period of years. Such allegations rarely allege a single activity only. Almost invariably, they involve a progression in the offending. Where such a range of offending is alleged, it is common for there to be convictions on some charges and acquittals on other charges (usually the more serious charges). It is also common for there to be different verdicts even though the charges are of the same type of offence. Is it really being suggested that a single charge is to be capable of being representative of various types of criminality?

The premise in (a) is that the complainant “cannot reasonably be expected to particularise dates or other details of the offences.” This is remarkably vague. What degree of detail is the complainant to be unable to particularise with sufficient certainty for a representative charge to be sanctioned? The reality is that complainants in sexual cases make their allegations in their own words and it is up to the investigators to establish as best they can the extent of what is being alleged. The complainant may not be able to give dates, but will commonly be able to give sufficient details for appropriate charges to be preferred. The particular allegations will often be referable to an occasion such as a birthday or a visit to a particular place or by a particular person. The complainant may allege a pattern of offending – to take an example, that a particular teacher indecently touched the

complainant during swimming lessons. Even if the allegation is as vague as “at least once a week until [some particular event]”, there is quite enough detail to draft an indictment or charge sheet that adequately represents the alleged criminality.

Particular counts do not have to be specific about particular dates. They can, if necessary, allege “on an occasion other than that referred to in count 1” or “in counts 1 to 15”. However it is done, it is perfectly possible to relate particular charges to particular allegations. Where, on the face of the allegation, identical conduct was indulged in by the defendant two or three times a week for two or three years, it will not be necessary to have 450 counts. First, no prosecutor would draft an indictment on the basis that the tribunal of fact might be satisfied about the maximum level of offending alleged because no jury would accept that the offending happened to the fullest extent alleged. Thus a prudent prosecutor would draft an indictment that took a sensible, minimum number of occasions. Secondly, a prosecutor would not only reduce the number of counts on pragmatic grounds, but also because he would recognise that there comes a point when the number of offences committed is going to make no difference to sentence in the event of conviction.

The essence of good prosecution practice is to have an indictment that adequately reflects the criminality alleged and which, in the event of conviction, would allow the court to pass an appropriate sentence for that criminality. Representative charges are not only unnecessary, they are dangerous, because they create the possibility that the judge or jury will be unable to reflect their view of the scale of offending by convicting on some counts and acquitting on others. The result will invariably be convictions in circumstances where a full set of charges would have resulted in some acquittals, and *vice versa*. For instance, where it is known that the court will only try one allegation, there is an obvious risk that a complainant will exaggerate, or an investigator will encourage the exaggeration of, the level of criminality, safe in the knowledge that the evidence as to the scale of the offending will never be put to the test.

As to the second situation provided for by clause 17, it is implicit within this category that the prosecution are in theory able to identify the totality of the offending. On what possible basis therefore would it be “unduly difficult” to manage the separate charges? Unless “difficult” is to be taken to mean “tiresome” or “laborious”, where is the difficulty? As stated above, the more similar the allegations, the easier it will be to prepare an indictment or charge sheet that reflects the criminality.

There is a fundamental flaw in these proposals which appears to have been overlooked by the authors. Where there are allegations of a series of offences of a like nature, the prosecution will in any event

be adducing the evidence on all the other offences as evidence of system. Thus, whether it is a swimming instructor alleged to have indecently touched one of his pupils on a large number of occasions or an allegation of passing worthless cheques, the prosecution will be putting in evidence the entire course of conduct. Why then, if all the evidence in relation to all the offences is to be before the jury, should there not be counts covering the criminality alleged? The overwhelming advantage is that there is certainty as to what has been established to the criminal standard, whereas the only disadvantages are that someone is going to have to take the trouble to prepare the charges, and, at some stage, the process of arraignment and, in due course, the taking of the verdicts will be a lengthier process (although certainly the process of arraignment could be short-circuited in a multi-count indictment).

England and Wales

In England and Wales, there are two instances at common law in which it is possible to include more than one offence in a single count. First, there are cases of a “general deficiency”. Here, there is no doubting that several offences have been committed, but it is genuinely impossible to give particulars of the individual offences. The typical example is of an employee stealing relatively small amounts from his employers over a long period, with the thefts going unnoticed until a stocktake or audit or some other form of investigation brings his offending to light. It might be possible to say with some certainty what the total “deficiency” is, but impossible to break down the individual dates and amounts. A charge of stealing (between specified days) the total amount missing would in such cases be acceptable.

Secondly, there are what are known as the “continuous activity” cases. A simple example might be a person who walks around a department store over the course of an hour or so and steals items from several different departments. Provided there is no particular reason for saying the activity was not a single activity, a single charge of theft would be appropriate.³⁴ Another example from the law reports was the activity of a person in felling several protected trees.³⁵ Technically, each tree felled would have been a separate offence, but common sense dictated that there be a single charge of felling however many trees were involved.

In 2004, Parliament passed the *Domestic Violence, Crime and Victims Act* 2004, sections 17 to 20 of which made provision for certain

³⁴ *R. v. Wilson (R.)*, 69 Cr.App.R. 83, (Court of Appeal).

³⁵ *Cullen v. Jardine* [1985] Crim.L.R. 668 (Queen's Bench Divisional Court).

counts to be tried without a jury. Section 17 allows the prosecution to apply to a judge in the Crown Court (this procedure having no application to summary trials before a magistrates' court, and having limited application even in the Crown Court) for some counts in an indictment to be tried by a judge alone. There are three conditions for acceding to such an application: first, the number of counts in the indictment must be such as to make it likely that a trial of all counts by a jury would be impracticable. Secondly, any count or counts to be tried by the jury must properly be regarded as a sample of the counts to be tried by judge alone. Thirdly, it must be "in the interests of justice" to make the order.

If an application under section 17 is acceded to, and there is a conviction on a sample count by a jury, then the defendant may be tried by judge alone on the other counts. In much the same way as the New Zealand proposals are flawed because they fail to recognise that in any of these cases, the whole of the evidence of the other offending will be before the court in any event, so section 17 of the 2004 Act is also flawed and, furthermore, pointless. By definition, any count that is to be tried by judge alone will be a sample of all the counts, in which case it is inevitable that the prosecution will be putting before the jury all the evidence in relation to all the counts. Since the jury are considering all the evidence, why not let them return verdicts on all counts? As at April, 2011, there has been no instance in the law reports of section 17 having been invoked successfully (or at all).

Comparison of the legislation in the two jurisdictions

The New Zealand proposed legislation goes significantly further than that in England and Wales. Under the 2004 legislation, it is at least necessary that the full scale of the criminality is set out in the indictment, there being no question of a single representative charge; and, of course, there has to be a trial of all the other charges, albeit a trial by judge alone. Whilst it may be thought that the verdicts on the other charges would be likely to be formalities, the process will still have to be gone through and a reasoned judgment will have to be delivered. In New Zealand, the proposal allows for a defendant in effect to be sentenced for offences which have never been specified and which have never been proved. As a matter of principle, this is fundamentally objectionable; and, as anyone who has ever practised in the criminal courts will know, it is likely to give rise to miscarriages of justice. The reality of practice is that cases do not always develop in a logical fashion: the pattern of verdicts that lawyers and judges might predict (especially at the outset of proceedings) frequently does not reflect the verdicts eventually returned by a jury.

B. Sentence indications

Clauses 58 to 63 of the New Zealand Bill formalise a system for enabling a court to give an indication of the likely sentence or range were the defendant to enter a plea of guilty at any point in the proceedings before trial. Any system for giving a sentence discount in return for a guilty plea can work injustice in two ways. First, an innocent defendant may be pressurised into pleading guilty. Secondly, a sentence may be imposed that does not reflect the harm done or the defendant's culpability. A formalised system is likely to accentuate the risk of such injustices. No longer will the defendant be in the position of having to make a judgment as to what is likely to happen. He will know what sentence he will receive if he pleads guilty in response to the indication. If his lawyers advise him that there is a real risk of conviction if he contests the case and that, if convicted, the sentence will almost certainly be custodial rather than the non-custodial indication, or that it will be 50 per cent longer than the sentence indicated, he may well feel he has no realistic alternative than to plead guilty. On the other hand, a court may end up "buying" a guilty plea, with the result that a defendant receives a sentence that does not come close to reflecting the actual gravity of his offending. There is plenty of anecdotal evidence in England and Wales, where the Court of Appeal sanctioned a non-statutory system of sentence indications in *R. v. Goodyear (Practice note)*,³⁶ that judges will "crack" trials (especially those that threaten to be long and complex) by giving inappropriately low indications.

This is not to suggest that there should be no discount where there has been a plea of guilty. A court should show mercy to those who are genuinely remorseful about what they have done, and a plea of guilty may be indicative of remorse, particularly where there is an early acceptance of responsibility accompanied by expressions of contrition and shame. In many cases, however, the only remorse a defendant who pleads guilty feels relates to the fact that he has been caught, and his plea is merely a recognition of the inevitability, having regard to the strength of the prosecution case, of a conviction. The approach of the courts in England and Wales and, more recently, of the Sentencing Guidelines Council, allows a defendant pleading guilty for this reason to be rewarded for his guilty plea. This is unprincipled and is based on considerations of expediency alone: the reasoning is that a plea of guilty saves time and money and should be encouraged, that the best way to encourage one is by granting a discount when it comes to sentence, and the earlier the plea is

³⁶ [2005] EWCA Crim. 888, [2005] 1 W.L.R. 2532.

indicated the greater the discount. The practice is so well entrenched now that there is effectively a tariff of discounts available at different stages of the proceedings. Even where the evidence is overwhelming such that the defendant is effectively left with no choice as to plea, the guideline says that he should receive a discount of 20 per cent.

In New Zealand, the Supreme Court in *R. v. Hessel*³⁷ rejected the heavily structured approach adopted by the Court of Appeal under the influence of the practice in England and Wales described above, in favour of a more principled approach. The court said that the credit that is given must reflect all the circumstances in which the plea is entered, including whether it is truly regarded as an early or late plea and the strength of the prosecution case. To treat the strength of the prosecution case as irrelevant was, in the court's view, also to treat as irrelevant the important factor of the extent to which a plea involves an acceptance of responsibility. The New Zealand bill is silent as to the extent of any discount for an early plea; it is hoped that in formalising a system of sentence indications in statute, the bill will not alter the principled approach of the Supreme Court in *Hessel*. The risk is that Parliamentary backing for discounts for early pleas will encourage judges to pitch their indications at levels which owe much more to expediency than to justice.

C. Appellate arrangements

This article has noted the complexities of the arrangements for trial under the New Zealand Bill, with its four categories of offence and the retention of the current arrangements whereunder there may be trial by jury in either a district court or the High Court. Unsurprisingly, the various appeal paths are correspondingly complex. Whilst many of the submissions on the bill commented on the proposal to restrict jury trial, few addressed the more fundamental arrangements relating to trial and appeal. One that did, however, was that of the Wellington Criminal Bar Association. It argued, in relation to trial, that the shared indictable jurisdiction needs to be "addressed rationally with a fresh approach, not tinkered with".³⁸ In relation to appeals, the submission highlighted the fact that the Court of Appeal is already "inundated" with criminal appeals, and that a makeshift solution has been to form a criminal appeal division of the court, where the quorum of three judges will include one or two High Court judges. "This creates the unsatisfactory spectacle of an appeal from [a] decision of a High Court judge being dealt with by ... judges

³⁷ [2010] NZSC 135, [2011] 1 N.Z.L.R. 607; and see *post*, pp.161-164.

³⁸ Wellington Criminal Bar Association, '*Criminal Procedure (Reform and Modernisation) Bill*: Submission for the Select Committee' (submissions to the Justice and Electoral Select Committee) (February 18, 2011).

from the same common room as the trial judge. ... Such a system raises an appearance of bias in the minds of many appellants and the appearance of a second rate appeal system.”³⁹ This complaint will be familiar to practitioners in England and Wales, where a merry-go-round of judges hear criminal appeals. Justice and the appearance of justice have long since been sacrificed in the cause of efficiency. Not only is it standard for judges of the High Court to sit in the criminal division of the Court of Appeal, but it is now commonplace for circuit judges (one rung down the judicial ladder from High Court judges) to sit as a member of the Court of Appeal. The official justification for this practice was that their experience as judges presiding over criminal trials would bring valuable expertise to the criminal appeal process. The reality is that they are there to make up the numbers. When statute first permitted the practice,⁴⁰ it was provided that a circuit judge could not sit on an appeal against a decision of a High Court judge, but even this restriction has now been lifted.⁴¹ England and Wales thus have not just the “unsatisfactory spectacle” of judges from the same common room hearing appeals from each other, but judges from the junior common room hearing appeals from judges from the senior common room. Add in the consideration that a particular court may be constituted by judges of three different levels in the hierarchy (circuit judge, High Court judge and judge of the Court of Appeal), and it becomes readily apparent that the notion that an appellant is having his appeal heard by a wholly “independent and impartial” tribunal is wide open to question.

V. CONCLUSIONS

Expediency v. Justice

It has been seen how justice has been, or is at risk of being compromised, by the dictates of expediency. Multi-count trials are inconvenient and expensive, pleas of guilty are essential to keep the wheels of justice turning, and fully independent appellate arrangements cannot be afforded, so traditional protections are jettisoned, bribes are offered and the traditional hierarchical court structure is rendered largely illusory by the constant rotation of judges.

³⁹ *ibid.*, [3.14].

⁴⁰ *Criminal Justice and Public Order Act 1994*, s.52.

⁴¹ *Courts Act 2003*, ss.67 and 109(3), and Sched. 10.

Expediency v. Principle

It has also been seen that, in the cause of re-balancing the scales, core principles of common law criminal justice have been eaten into. An adversarial process under which the prosecution alone have any burden of proof, and a key value of which is that a person should not be compelled to incriminate himself, cannot be squared with an advance duty on the defendant to say why he is not guilty, with inferences of guilt being permissible where there has been a failure to make advance disclosure or to give evidence, or with a case management role being imposed on the court. This is especially the case where the court is expressly charged with the function of managing the case so as to secure a just (*i.e.* the factually correct) result and all parties (defendant and defence counsel included) are commanded to conduct their cases with a view to assisting the court in that task.

A vicious circle?

In *R. v. Clarke and McDaid*⁴² the House of Lords quashed the convictions of the appellants because, it was held, the failure of the appropriate court officer to sign the indictment as required by statute meant that there was no indictment at all. This was widely perceived to be the quashing of convictions of serious criminals on account of a mere technicality,⁴³ although as Lord Bingham said, “it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place”.⁴⁴ The reaction of government, predictably, was not to inquire into why there had been such a failure and to take steps to ensure that it was not repeated, but to abolish a rule that had existed for good reason for many years.⁴⁵ The judgment of Sully J. in the New South Wales case of *R. v. Swansson; R. v. Henry*⁴⁶ exposes the dangers of such knee-jerk legislation. He held that a failure to observe the long-established rule of the common law that there can be only one indictment in any one criminal proceeding⁴⁷ rendered the proceedings a nullity. Having stated that the principle had always been regarded, not as a mere technicality, or as an optional procedural extra, but as a

⁴² [2008] UKHL 8, [2008] 1 W.L.R. 338.

⁴³ J.R.Spencer, ‘Quashing convictions for procedural irregularities’, [2008] C.L.J. 227; Nick Taylor, ‘Indictment: correct application of *Soneji* approach to procedural irregularities where proper officer fails to sign indictment’, [2008] Crim.L.R. 551.

⁴⁴ *R. v. Clarke and McDaid* (n.42), [17].

⁴⁵ *Coroners and Justice Act* 2009, s.116.

⁴⁶ [2007] NSWCCA 67, 69 N.S.W.L.R. 406.

⁴⁷ *Crane v. D.P.P.* [1921] 2 A.C. 229 (House of Lords).

fundamental norm of a trial upon indictment according to law, Sully J. continued:

“The submissions of the Crown deal with the particular fundamental norm in a way which is becoming ... disconcertingly familiar in the ongoing development of the criminal law, and not least in the ongoing development of the common law of crime. It is now commonplace for proponents of what they are pleased to call law reform to attack some entrenched principle upon the sole basis that, to borrow the Chief Justice’s paraphrase: ‘It is a technicality which has no contemporary significance.’

It seems to me that the experience of the recent past teaches that any use of that invocation of ‘contemporary significance’ in the context of proposed fundamental changes to, especially, the law of crime should cause warning lights to flash in the mind of every common law judge.”⁴⁸

Having then referred to a paper given by Sir Owen Dixon (the former Chief Justice of Australia)⁴⁹ and to an essay by G.K. Chesterton,⁵⁰ he continued:

“The origins of the present appeal are ... a paradigm example of the dangers against which, in their different ways, both Dixon C.J. and Chesterton were warning. For if it be asked why the existing and well-entrenched norm of ‘one indictment, one jury’ should now be swept away at, so to speak, a stroke of the curial pen, then the frank answer is that to sweep away the norm would rescue the *amour propre* of whoever it was who decided, for reasons which nobody was able to propound ..., to depart from the norm. I can envisage, for my own part, no more unconvincing, no more unjustifiable, a basis upon which to disturb a fundamental norm of a criminal trial in our system of criminal justice.”⁵¹

It has been suggested that many of the complaints about the operation of the criminal justice system in New Zealand had little to do with the state of the statute book but much to do with case preparation. Responding to bad practice or procedural failure by moving the goalposts to accommodate such lapses, whether by changing the rules themselves or exercising a discretion to excuse the lapse by reference to some greater good, does nothing to encourage good practice. On the contrary, it fosters a culture of non-compliance, which panders to the lowest common denominator, and

⁴⁸ R. v. Swansson; R. v. Henry (n.46), [99], [100].

⁴⁹ A paper delivered at Yale University in 1955 by Sir Owen Dixon, ‘Concerning Judicial Method’, *Jesting Pilate and other papers and addresses* (Melbourne, Law Book Co. 1965).

⁵⁰ G.K. Chesterton, *Orthodoxy* (Dover Publications Inc. 2004).

⁵¹ R. v. Swansson; R. v. Henry (n.46), [103].

in which there is little or no reward for professional excellence. The risk is that the most able professionals will ply their trade elsewhere, that failures of procedure will multiply, and that the response will yet again be to relax the rules.

The value of procedure

Attaching value to procedure is to promote excellence in practice. Llewellyn was uncompromising in his view that procedural regulations should be marked off for the “most intensive” separate study “because they are of such transcendent importance as to need special emphasis. ... For what substantive law says should be means nothing except in terms of what procedure says that you can make real.”⁵²

The New Zealand legislature must now decide whether it wishes to pursue this legislation in the face of widespread concern. It must also decide whether the English and Welsh precedent is really the one that they wish to follow, given that the English criminal procedure reforms had their roots in civil reforms that many perceive to have failed in their attempt to address excessive cost, delay and complexity. Bearing in mind that these were the exact complaints listed by Simon Power about criminal procedure in New Zealand when he introduced the bill, should not the experience in England and Wales give the New Zealand Parliament pause for thought? Rather than heed the enthusiastic endorsement of the case management culture by the senior English judiciary, it is suggested that the New Zealand legislators should heed the concerns of their own most senior judiciary, and consider ploughing their own furrow in recognition of the *dictum* of the distinguished American jurist, Frankfurter J., when he said that “the history of American freedom is in no small measure, the history of procedure.”⁵³

⁵² Karl Llewellyn (n.2), 11.

⁵³ *Malinski v. New York* 324 U.S. 401 (1945), [27].

JURISDICTION SPOTLIGHT: AUSTRALIA

SASKIA HUFNAGEL*

I. RECENT DEVELOPMENTS: HARMONIZATION OF CRIMINAL LAW, TERRORISM AND ORGANISED CRIME

ABSTRACT

This article focuses on three important recent trends in the development of the criminal law in Australia: first, the harmonisation and federalisation of criminal law; secondly, the enactment of sometimes controversial terrorism offences in the wake of the “war on terror”; and thirdly, the making of new laws to deal with organised crime. The last two decades in particular, have seen a move towards greater harmonisation and the creation of new federal offences, particularly in the areas of terrorism, serious and organised crime, and cybercrime. This article discusses both the domestic and international impact of these developments. In order to understand the way criminal law operates, and has developed, in Australia, it is important first to summarise Australia’s particular federal constitutional framework.

A. Criminal law in Australia’s federal framework

Australia is a federal system and consists of nine jurisdictions – six states, two territories and the Commonwealth of Australia. The Australian model of “cooperative” federalism leaves the power to legislate in several areas to the states and territories.¹ The general criminal law and the laws of criminal procedure are areas of prime responsibility for the states and territories.² The power of the states

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¹ *Commonwealth of Australia Constitution Act 1900* (Imp.), Ch. V, s.108, read in conjunction with s.51.

² Note that only Australian states have sovereignty under Ch. V, s.108 of the *Constitution*, while the two territories (Northern Territory and Australian Capital Territory) are more dependent on the federal state. However, the territories also have their separate jurisdiction, police and criminal legislation. In relation to the particular role of the territories, the Commonwealth ceased to be a major influence on local policing issues in the Australian Capital Territory (*Australian Capital Territory (Self-Government) Act 1988* (Cth)) and the Northern Territory (*Northern Territory (Self-Government) Act 1978* (Cth)) when these achieved self-government status in 1988 and 1978, respectively. However, unlike in its relation to the states, the Australian Parliament has a power to override laws in the territories. The Federal Parliament’s

and territories to enforce their laws and the autonomy in making these laws - within the limits of section 51 (Powers of Parliament) of the *Australian Constitution* - stems from section 108 of the *Australian Constitution*.³ However, the Commonwealth can legislate in the field of criminal law in a range of areas where it has constitutional responsibility, with the effect that these laws are directly applicable to the states and territories. These powers are not merely limited to enacting regulatory offences, but extend to serious crimes such as terrorism and national security offences.

Territoriality in Australia is therefore in some ways even more complicated than in other federal systems. Rather than having distinct federal, state and territory substantive and procedural criminal laws, the competences in Australia overlap.⁴ Because of the expansion of Australian federal criminal law in recent years and, in particular, in relation to terrorism since 2001 and organised crime since 2010, jurisdictional overlap has grown significantly.⁵ Unless the federal law has expressly preserved the operation of state law, under the *Constitution*, in cases of conflict, state and territory law is deemed invalid to the extent of inconsistency with federal law (s.109).⁶

This constitutional framework means that the states and territories must negotiate the division of their powers on a bilateral and multilateral basis or give up competences to the federal government to enhance efficient cross-border police and criminal justice cooperation. As the giving up of competences is a rare occurrence in the Australian context, strategies had to be developed to create greater uniformity, while preserving state sovereignty in the field of criminal law.

Overleaf: Australian criminal court system (diagram)

power to legislate directly for the territories was exercised most recently to override controversial voluntary euthanasia laws in the Northern Territory: *Rights of the Terminally Ill Act* 1995 (N.T.), repealed by the *Euthanasia Laws Act* 1997 (Cth), Sched. 1.

³ The *Commonwealth of Australia Constitution Act* 1900 (Imp.) states in Ch. V, s.108 that: “Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.”

⁴ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (3rd edn, Thomson Reuters 2010), 91.

⁵ *Crimes Legislation Amendment (Serious and Organised Crime) Act* 2010 (Cth); *ibid*, 91.

⁶ Section 109 states: “When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

High Court

History: Established in 1901 by section 71 of the Commonwealth of *Australia Constitution Act* 1900, with the appointment of the first Bench taking place in 1903 (Judiciary Act 1903).

Jurisdiction: The High Court is the final court of appeal in Australia, and also has original jurisdiction (the 1900 Act, ss.74 and 75). Its functions are to “interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals, by special leave, from Federal, State and Territory courts”.

Supreme Courts

Jurisdiction: Each of Australia's main states and territories have their own court hierarchy, with varying jurisdictions. All have a supreme court, which is the highest court within that state or territory, and which have both appellate and original jurisdiction or both a trial division and an appellate division. The original jurisdiction usually includes very serious indictable offences such as treason, murder, and attempted murder.

Federal Court

History: created by the *Federal Court of Australia Act* 1976, and began to exercise its jurisdiction on 1977.

Jurisdiction: the court's original jurisdiction (conferred by over 150 statutes of the Australian Parliament) includes jurisdiction to hear and determine any matter arising under the Constitution and jurisdiction in relation to the new indictable offences for serious cartel conduct (since 2009), and covers some summary criminal matters. The court also has appellate jurisdiction (1976 Act, s.24), including criminal appeals from the Supreme Court of Norfolk Island, and some federal appeals from State Supreme Courts. The court's original jurisdiction is usually exercised by a single judge (s.20), and the appellate jurisdiction by a Full Court, comprising three judges, which also hears appeals from judgments of the court constituted by a single Judge (1976 Act, s.25).

District or County Courts

Jurisdiction: Most Australian states and territories have district or county courts, which will handle criminal trials for less serious indictable offences, and which are usually presided over by a judge. In jurisdictions without district or county courts (i.e. Northern Territory, Australian Capital Territory and Tasmania, Norfolk Island), these matters will be dealt with by the supreme courts.

Specialist Courts and Tribunals

Jurisdiction: Most states and territories also have specialist courts and tribunals, for example children's courts, coroner's courts, and drug courts. These courts and tribunals vary from state to state and tribunal to tribunal, as do their position in the court hierarchy of the state. In some instances, appeals from the courts and tribunals will go to the district court, in others, the Supreme Court.

Magistrates' or Local Courts

Jurisdiction: All states and territories have a magistrates' or local court (or court of petty sessions in Norfolk Island), which handles criminal summary matters (among other matters), and which is usually presided over by a magistrate or a justice of the peace.

B. Harmonisation

Harmonisation occurs in one of two ways. First, it occurs through linking the powers to legislate on criminal law and procedure to heads of Commonwealth power in the constitution; thus there are federal offences related to taxation, customs and environmental protection.⁷ The link can be fairly tenuous, so for example, the power to deal with drug trafficking stems from two sources: the customs power of the Commonwealth to regulate imports and exports (narcotics are a form of prohibited import or export), and the external affairs power to implement treaties including various international treaties aimed at narcotics control, discussed further below. The alternative model to using a federal head of power is to enact mirror legislation in each of the states and territories – a noteworthy example is the uniform *Corporations Act* 2001 (Cth) adopted throughout the Australian jurisdictions.

Historically, the *Crimes Act* 1914 (Cth) contained the most serious offences against the Commonwealth. This has largely been replaced by the *Criminal Code Act* 1995 (Cth)⁸ which abolished common law offences and codified the relevant statutory and common law governing the principles of responsibility and defences in the field of Commonwealth criminal law. The most significant Commonwealth criminal offences were modernised and redrafted in order to comply with the principles of responsibility and, in many cases, relocated from the *Crimes Act* 1914 (Cth) to the *Commonwealth Criminal Code*.⁹ Since its enactment, a number of new provisions were added in the areas of terrorism and organised crime.¹⁰ However, not all federal offences are to be found in the code, and many regulatory offences and penalties are to be found scattered across the federal statute books.

A considerable body of harmonised legislation exists in the field of criminal law in Australia. The extension of federal jurisdiction in several areas, in particular in relation to war crimes, crimes against humanity, genocide and terrorism, has been directly influenced, indeed required, by Australia's obligations under international law. The relevant provisions in relation to war crimes, crimes against humanity and genocide were inserted into Division 268 of the *Commonwealth Criminal Code* after Australia implemented the *Rome*

⁷ Simon Bronitt and Bernadette McSherry (n.4), 91-93.

⁸ Henceforth also “*Commonwealth Criminal Code*” or simply “*Criminal Code*”.

⁹ See, in relation to the establishment of the *Criminal Code*, Bernadette McSherry, ‘Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Laws’ (2004) 27 University of New South Wales Law Journal 354, 355-356.

¹⁰ See, in relation to terrorism offences, *ibid.*; and see, in relation to organised crime, *Crimes Legislation Amendment (Serious and Organised Crime) Act* 2010 (Cth), and Simon Bronitt and Bernadette McSherry (n.4).

Statute of the International Criminal Court in 2002.¹¹ Another field where international law had a considerable influence on Australian federal legislation was illicit substances. In response to the 1961 *Single Convention on Narcotic Drugs*,¹² the *Narcotic Drugs Act* 1967 (Cth) was enacted, widening the range of prohibited substances falling under Commonwealth jurisdiction. Similarly, the introduction of the *United Nations Convention on Psychotropic Substances*¹³ in 1971 triggered the creation of the *Psychotropic Substances Act* (Cth) in 1976. It follows that global developments and international concern about particular forms of serious crime have had an impact on the creation of harmonised legislation in Australia.

C. Harmonisation of drug laws

The federal offences that are perceived as presenting most difficulty for law enforcement in the Australian context include offences dealing with drugs, interference with telecommunication systems, terrorism and the protection of Commonwealth officials.¹⁴ Drug offences constitute the single most challenging area of law in this regard; federal competence applies in relation to importation and exportation (under the customs power) as well as manufacture and cultivation (as mandated by the relevant international treaties). However, state and territory drug laws continue to apply to possession, supply and use. Here, the overlap between Commonwealth, and state and territory jurisdictions becomes particularly apparent. In many cases the Australian Federal Police, as well as the different state and territory police, may be competent to investigate and prosecute, sometimes triggering joint investigations, though also a struggle over jurisdictional competence.¹⁵

The overlapping nature of jurisdictions in relation to drug law and law enforcement is exemplified in the High Court landmark decision of *Ridgeway v. R.*¹⁶ The accused was convicted of possession of a quantity of illegally imported heroin. He had contacted a man whom he had met in an Australian prison to propose a heroin smuggling operation. That contact had become a police informant, who alerted the authorities. A controlled delivery of the drugs was organised, with the effect that the drugs sold to the accused were imported with

¹¹ Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 23 Sydney Law Review 507, 507-508.

¹² Signed March 30, 1961, 520 UNTS 115 (entered into force December 13, 1964).

¹³ Signed February 21, 1971, 1019 UNTS 175 (entered into force August 16, 1976).

¹⁴ Information based on interviews with law enforcement officials conducted in the course of the author's Ph.D. research (2007-2010).

¹⁵ *ibid.*

¹⁶ [1995] HCA 66, (1995) 129 A.L.R. 41.

the cooperation and assistance of the federal police and Australian Customs, a police informant and a Malaysian police officer. The defendant's conviction was overturned by the High Court on the ground that, at that time, the police operation had involved serious illegality on the part of the law enforcement officials (the federal police were knowingly involved in the unlawful importation of heroin), and that this had constituted a key element of the offence. Although the conviction was quashed, the High Court noted that the evidence based on the unlawful operation should have been excluded and all the charges against the accused should have been stayed permanently. The accused could have been prosecuted for a range of offences against the law of South Australia, in which proof of an unlawful importation was not an element. As the majority of the High Court noted:

“[T]he appellant's possession of the heroin at the time he was apprehended constituted any one of a variety of offences against the law of South Australia of which illegal importation was not an element and which range from knowing possession of a prohibited substance or drug of dependence (maximum penalty: \$2,000 and two years' imprisonment) to possession of more than the prescribed quantity of a prohibited substance or drug of dependence for the purpose of sale or supply (maximum penalty: \$500,000 and life imprisonment). That being so, the effect of a stay of the prosecution of the appellant for offences against the *Commonwealth Act* would be that the appellant remained liable to be prosecuted under state law.”¹⁷

Clearly then, there is no exclusive federal jurisdiction in relation to drug offences – in other words, the Commonwealth does not “occupy the field”. There is no simple rule related to the quantity or type of drugs found that triggers federal jurisdiction. Competences are therefore negotiated between the different jurisdictions, in particular with regards to imported narcotics.¹⁸ The inter-agency negotiation of respective competences solves the problem in practice, but it creates challenges at the macro level, as there may be significant differences in penalties for the offence of possession under state and territory laws and for drug importation offences under federal law: for example, in *Ridgeway v. R.* the penalty for involvement in importing heroin was a maximum of life imprisonment, while the South Australian possession of this type of prohibited substance or drug of dependence carried only two years' imprisonment (though possession for the purpose of sale or supply carried life imprisonment). The significant inter-jurisdictional discretion to

¹⁷ *ibid.*, [36] per Mason C.J., Deane and Dawson JJ.

¹⁸ See Pt 9 of the *Criminal Code Act* 1995 (Cth).

negotiate competence over charges accordingly has the potential to lead to forum shopping by law enforcement officials and unjust outcomes for offenders.

The reason for enacting federal offences is to highlight at the national level the seriousness of offences that have a trans-border or international dimension, as well as to empower an overarching federal law enforcement agency (Australian Federal Police or Customs) with jurisdiction. However, as the above case shows, the advent of federal legislation has, in many instances, gone too far, complicating rather than enabling cross-jurisdictional law enforcement practice and creating jurisdictional discrepancies for offenders. An alternative solution would be to seek harmonisation through requiring consistency of offence definitions and penalties across all Australian jurisdictions. The Model Criminal Code project promotes this desirable objective, though progress has been painfully slow, and many scholars doubt whether the goal of even broad consistency of criminal laws in Australia is feasible.¹⁹

D. Terrorism law: Australia's approach to the "War on Terror"

This part of the article gives an overview of controversial offences enacted in Australia after the terrorist events of September 11, 2001, in the United States. An examination of specific terrorism offences, the extraterritorial reach of these laws and a selection of the leading cases decided so far provide an insight into Australia's approach to the "War on Terror".

More than 100 new laws were enacted in Australia as a response to the September 11, 2001 attacks. Human rights scholars and activists have voiced concerns not only in relation to the rushed process of their adoption, but also in relation to resulting substantive and procedural laws. There has been strong objection to the criminalisation of both "status" and mere "association" with members of terrorist groups. The objection typically relates to the criminalisation of behaviour that is remote to any terrorist act. These new offences have been supplemented by a wide range of coercive powers for intelligence agencies that limit traditional fair trial rights, such as the right to silence,²⁰ and, by allowing for preventive detention, the right not to be held without charge.²¹

¹⁹ Simon Bronitt and Bernadette McSherry (n.4), 105.

²⁰ *Australian Security Intelligence Organisation Act 1979; Australian Crime Commission Act 2002, Pt 2, Division 2.*

²¹ See for example Simon Bronitt and Bernadette McSherry (n.4), 973; Russell Hogg, 'Executive Proscription of Terrorist Organisations in Australia: Exploring the Shifting Border between Crime and Politics' in Miriam Gani and Penelope Matthews (eds), *Fresh Perspectives in the War on Terror*" (ANU E-Press 2008), 297-323; Saskia

To avoid doubt about the constitutional validity of the federal offences and powers, Australian states and territories referred legislative powers for terrorism matters to the Commonwealth under section 51(xxxvii) of the Constitution in 2003.²² The Commonwealth Parliament could therefore enact legislation applicable to the states. However, as terrorism is governed by federal law, all states and territories can use Commonwealth legislation in state courts to prosecute terrorism offences.

The first wave of terrorism offences introduced into the *Criminal Code Act* 1995 (Cth) in 2002 and amended in 2003, drew heavy criticism.²³ The concerns expressed by the Senate Legal and Constitutional Committee related primarily to the proscription regime (the procedure leading up to the declaration of an organisation as “terrorist”).²⁴ When the *Security Legislation Amendment (Terrorism) Act* 2002 was incorporated into the *Commonwealth Criminal Code*, the Attorney-General’s power to proscribe organisations by declaration was therefore reduced to a power to make a regulation specifying an organisation, which, in requiring Parliamentary approval, added an additional safeguard before proscription.²⁵ The grounds for proscription were restricted by linking them to United Nations Security Council decisions and resolutions.²⁶

However, in 2003 the link to United Nations Security Council decisions and resolutions was dropped, as this restriction was claimed to inhibit effective response to threats specific to Australia. The purported safeguard provided by the link to the Security Council was removed and the broad listing power of proscription by the Attorney-General restored.²⁷

The criteria for listing an organisation were consequently linked to the concept of a “terrorist act”. “Terrorist act” is defined as an action or threat of action where the action (s.100.1(2)):

- (i) causes serious harm that is physical harm to a person;
- (ii) causes serious damage to property;
- (iii) causes a person’s death;

Hufnagel, ‘German Perspectives on the Right to Life and Human Dignity in the ‘War on Terror’’ (2008) *Criminal Law Journal* 101.

²² *Criminal Code Amendment (Terrorism) Act* 2003; see Simon Bronitt and Bernadette McSherry (n.4), 991.

²³ Russell Hogg (n.21), 299-301.

²⁴ Senate Legal and Constitutional Committee, Parliament of Australia, *Consideration of Legislation Referred to Committee: Security Legislation (Terrorism) Bill 2002* [No. 2]; *Suppression of the Financing of Terrorism Bill 2002*; *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002*; *Border Security Legislation Amendment Bill 2002* (2002), [2.155], [3.107]-[3.109].

²⁵ See *Criminal Code Amendment (Terrorism) Act* 2003.

²⁶ See for example Russell Hogg (n.21), 299.

²⁷ See *Criminal Code Amendment (Terrorist Organisations) Act* 2004.

- (iv) endangers a person's life, other than the life of the person taking the action;
- (v) creates a serious risk to the health or safety of the public or a section of the public, or
- (vi) seriously interferes with, seriously disrupts, or destroys, an electronic system.

The action or threat has to be made with the intent of advancing a political, religious or ideological cause and coercing or intimidating the public or a section of the public (s100.1(1)). This definition is basically copied from the United Kingdom *Terrorism Act* 2000 and is subject to similar criticisms.²⁸ In particular, the wide range of actions or threat of actions included and the vagueness of the provision were a target for criticism.

Whether or not a group is a terrorist organisation is determined by executive proscription or, if there is proof of the connection to a "terrorist act", a judicial determination on facts presented to the court at trial (s102.1(1)(a)). No prosecutions have taken place in Australia against any member or supporter of the proscribed organisations on the list.²⁹ This is not surprising as none of the listed organisations are active in Australia.³⁰ However, the list is relevant in relation to the gathering of intelligence and has effects on particular immigrant communities in Australia through specific police targeting.

Further impacts on refugee and immigration laws are apparent. Under Australian law³¹ an applicant for refugee status, despite having exercised political violence against a regime overseas, can have a legitimate claim before the Australian refugee tribunals. Such a person, who may be a victim of persecution in his home country (as happened in the 2005 case of a Turkish Kurd who was a member of the PKK)³², may therefore be a member of an organisation that appears on the list of proscribed organisations. This raises the prospect of such a person giving evidence in immigration proceedings as to political violence he has engaged in when a member of a proscribed organisation, and that evidence later being used against him in a prosecution for a terrorism offence.

The listing process is summarised in sections 102.1 and 102.1A. The legislation states that the Attorney-General receives a statement of reasons from the Australian Security Intelligence Organisation for a particular listing, following which, if satisfied with the reasons provided, he may make a regulation and initiate further formalities.

²⁸ Simon Bronitt and Bernadette McSherry (n.4), 988-989.

²⁹ Russell Hogg (n.21), 315.

³⁰ *ibid.*

³¹ *Minister for Immigration and Multicultural Affairs v. Singh* (2002) 209 C.L.R. 533; *T. v. Secretary of State for the Home Department* [1996] A.C. 742 (House of Lords).

³² N04/49229 decision of the Refugee Review Tribunal Bulletin 2/2005, 12.

The Attorney-General then approaches Parliament's Joint Committee on Intelligence and Security in conjunction with the leader of the opposition and the leaders of the states and territories, to state the reasons for the listing. The regulation is subject to disallowance by Parliament. An important point about the listing procedure is that human rights debates and the balancing of security concerns versus human rights often take place in disputes between Parliament and the executive in listing debates.

Offences relating to engagement with proscribed organisations are enumerated in sections 102.2-8 of the *Criminal Code Act* 1995 (Cth). They include the direction of the activities of a terrorist organisation, recruiting for and funding of a terrorist organisation, and the support of a terrorist organisation. These activities are punishable by a minimum of 15 and a maximum of 25 years' imprisonment. Training or being trained by a terrorist organisation is punishable by a 25-year jail term, while membership incurs only 10 years' and "association" offences only three years' imprisonment. The "association" offences, in particular, represent a fundamental departure from general Australian criminal law concepts, as they attach severe penalties to proof merely of relevant status. Furthermore, terms like "member" and "support" are left undefined and do not require a link to a prohibited activity.³³

The first wave of terrorism offences were enacted in 2002 and 2003 to comply with United Nations Security Council Resolutions. Many of these were offences that could potentially affect humanitarian involvement,³⁴ including provisions criminalising the financing of terrorism and the collection of funds to finance acts of terrorism, which were introduced in 2001 to comply with Security Council Resolution 1373.³⁵ Similarly, Security Council Resolution 1267 impacted on Australian legislation relating to the listing of terrorist organisations and the freezing of assets.

One of the more controversial reforms in Australia was the criminalisation of "advocacy" under section 102.1(1A), which makes it an offence for an organisation even to praise terrorism. This has been claimed to infringe the right to free speech, raising concerns about its "chilling effect" on public debate and the rise of

³³ See, for further detail, M. Gani and G. Urbas, 'Alert or Alarmed? Recent Legislative Reforms Directed at Terrorist Organisations and Persons Supporting or Assisting Terrorist Acts' (2004) 8 Newcastle Law Review 19; B. McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in B. McSherry, A. Norrie and S. Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Oxford, Hart Publishing 2009).

³⁴ See *Criminal Code Amendment (Terrorism) Act* 2003.

³⁵ See Andrew Lynch, Nicola McGarrity and George Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) Federal Law Review 5.

censorship.³⁶ This threat to human rights is particularly acute in the Australian context, since there is no national human rights bill or charter. Two jurisdictions have adopted local human rights legislation (modelled on the United Kingdom *Human Rights Act* 1998), though these laws cannot limit federal terrorism laws or the powers of the federal police.³⁷ Also, in the absence of implementing legislation, binding international human rights treaties which Australia has ratified are not directly enforceable in the courts, so human rights provisions contained in such treaties can only be raised in domestic proceedings to guide the development of the common law or to interpret legislation in cases of ambiguity. This explains why so far, only a limited number of human rights issues relating to the new terrorism offences have reached the courts.

Australian terrorism offences have furthermore an international impact, for example in relation to international humanitarian intervention and more specifically humanitarian access and assistance under sections 102.6-8. Section 102.8(4)(c) contains an exemption for humanitarian aid, but this exemption is only applicable for the broad “association” offence. Support of and the provision of funds to terrorist organisations, which might become necessary to further humanitarian aid in conflict zones, are not exempt. These offences are subject to 15 to 25 year sentences.

An example of the international impact of terrorism offences is the recent Victorian Supreme Court decision in *R. v. Vinayagamoorthy*.³⁸ The evidential basis for this decision was provided by an investigation conducted by the Australian Federal Police in Sri Lanka against Australian citizens.³⁹ The suspects, three Tamil

³⁶ The “advocacy” provision (s.102.1(1A)) is a more recent addition to the Act and particularly contested as the definition of “advocates” creates possibilities of invasion of open, pluralistic, democratic discourse concerning events of international significance (free speech):

“(1A) In this Division, an organisation advocates the doing of a terrorist act if:

- (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or
- (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
- (c) the organisation directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act.”

See also Simon Bronitt and Bernadette McSherry (n.4), 1008-1009.

³⁷ *Human Rights Act* 2004 (ACT); *Charter of Human Rights and Responsibilities Act* 2006 (Vic.).

³⁸ [2010] VSC 148.

³⁹ See for summary of the facts Brian Walters, ‘Tormenting the Tamils with Our Terror Laws’, ABC News, 31 March 2010 at <<http://www.abc.net.au/unleashed/33354.html>>, accessed May 12, 2011.

Australians, were suspected of providing funds to the Liberation Tigers of Tamil Eelam (LTTE).⁴⁰ The police investigation had been initiated by the Sri Lankan government and the evidence gathered was subject to review by the Sri Lankan Deputy Solicitor-General, who also reserved the right to “advise” witnesses.⁴¹ These events not only had a potential adverse affect on humanitarian aid for people living in the LTTE-governed territory of Sri Lanka, but severely infringed the suspects’ fair trial rights in Australia.⁴²

The three Tamil Australians were convicted of providing resources to the LTTE on March 31, 2010. As charges under *Criminal Code Act* 1995 (Cth) had not been possible (since the LTTE is not a proscribed terrorist organisation under Australian legislation), the defendants were charged and convicted under an offence contained in the *Charter of the United Nations Act* 1945 (Cth). Despite the court agreeing that the funds were not provided for a terrorist purpose, the provision of funds to a terrorist organisation was here penalised, independently of a terrorist act.⁴³ However, although the offence of “providing funds to a listed organisation”, under the *Charter of the United Nations Act* 1945 (Cth), attracts sentences of up to five years’ imprisonment, the defendants avoided immediate jail terms.⁴⁴ This decision, and the previously outlined terrorism offences, do highlight, however, moves towards a restrictive regime for suspects and increasing powers for the state. This trend in recently-enacted federal legislation can be further highlighted in the area of organised crime.

A further international impact is given by the introduction of extraterritorial effects of Australian terrorism laws. Sections 102.10 and 103.3 provide for extended geographical jurisdiction for offences under section 15.4:

“Extended geographical jurisdiction – category D

If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

- (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
- (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.”

⁴⁰ See for a comment on the decision Victoria Sentas, ‘Terrorist Organisation Offences and the LTTE: R v Vinayagamoorthy’, *Current Issues on Criminal Justice* 22(1) (2010) 159-169.

⁴¹ McKenzie N and Baker R, ‘Raising hackles’, *The Age*, March 31, 2010 <<http://www.theage.com.au/national/raising-hackles-20100330-rbit.html>>, accessed May 12, 2011.

⁴² Victoria Sentas (n.40), 165.

⁴³ *ibid.*

⁴⁴ *ibid.*

Even though no threat against Australian security is evident, a person can be severely punished for being a “member” of a “terrorist organisation” in a country involved in a violent political conflict far removed from Australia. As was noted by Russell Hogg, “an offence may be committed by a foreigner against a foreigner in a foreign country remote geographically from and of no particular interest to Australia”.⁴⁵ This is one of the rare examples of an Australian offence with universal jurisdiction.

Furthermore, extraterritorial effects can occur when Australian citizens or residents are murdered (s.115.1) even on foreign territory. Punishment is life imprisonment. This offence of “Harming Australians Overseas” was introduced after the Bali bombings on October 12, 2002, where 88 Australians were killed. Not only is the offence extra-territorial in operation, but it also has retrospective application. This law was enacted notwithstanding the fact these acts were serious criminal offences committed on Indonesian territory and the Bali bombers were tried and convicted, and some ultimately sentenced to death, in Indonesia.⁴⁶

E. Organised crime

New laws on organised crime were triggered in Australia by several incidents in recent years involving outlaw motorcycle gangs. One of these incidents occurred in March, 2009, when during a brawl between members of the Comanchero and Hells Angels motorcycle clubs at Sydney Airport a person was killed, which elevated the problem to a national level. As a result of the Sydney incident, greater focus was put on legal harmonization and cooperative law enforcement efforts in Australia in relation to serious and organised crime. In his first National Security Statement in December, 2008, the then Prime Minister, Kevin Rudd, had already highlighted the growing complexity of organised crime as a security challenge which, in combination with several motorcycle gang incidents, triggered the changes to legislation outlined below.⁴⁷

As a first response, the Commonwealth Organised Crime Strategic Framework was launched in November, 2009.⁴⁸ It was, for example, agreed that the federal Australian Transaction Reports and Analysis Centre (AUSTRAC) should receive more support to ensure more effective counter-measures to serious and organised crime. In the context of serious and organised crime, the centre targets revenue

⁴⁵ Russell Hogg (n.21) (quoting Bell J. in *R. v. Ul-Haque*, unreported, NSWSC, February 18, 2006), 302.

⁴⁶ Simon Bronitt and Bernadette McSherry (n.4), 975-976.

⁴⁷ *ibid.*, 1037.

⁴⁸ *ibid.*

evasion and financial fraud in Australia but is predominantly a centre of information exchange rather than having enforcement powers.

Furthermore, in 2009, the Standing Committee of Attorneys-General agreed to develop a comprehensive national approach ensuring a coordinated national effort to prevent, investigate and prosecute organised criminal activities, as well as target the proceeds of organised criminal groups and combat organised and gang-related crime.⁴⁹ In February, 2010, the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) was introduced as a model law. The legislation contained new offences to deal with organised crime, enhance law enforcement powers, strengthen the legislation providing for the confiscation of criminal assets and prevent money laundering. In some jurisdictions, including South Australia and New South Wales, the legislatures have enacted control orders, which have the effect of prohibiting contact between persons of declared organisations. However, as the states and territories had not referred powers to the Commonwealth in the field of organised crime, the Federal Parliament was unable to enact “control orders”. This limitation on federal competence may be contrasted with the referral of powers that occurred in relation to measures to prevent acts of terrorism (which include control orders and preventive detention) under the *Commonwealth Criminal Code*.⁵⁰

However, the Act significantly altered the *Commonwealth Criminal Code* and created the new Part 9.9: “Criminal associations and organisations”. The new offences created include:

- associating in support of serious organised criminal activity (s.390.3);
- providing support for a criminal organisation (s.390.4);
- committing an offence for the benefit of, or at the direction of, a criminal organisation (s. 390.5);
- directing activities of a criminal organisation (s.390.6).

These new Australian provisions are highly controversial and have been criticised as being neither particularly practical nor inclusive.⁵¹

⁴⁹ See Standing Committee of Attorneys-General, *Current Projects and Achievements* (July 12, 2010), <http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_achievements>, accessed May 12, 2011.

⁵⁰ Kylie Weston-Scheuber, ‘Case and Comment: *Totani v South Australia - Organised Crime Laws Under Fire*’, (2009) 33 Criminal Law Journal 357.

⁵¹ For a submission on the federal legislation which provides a detailed analysis of the new offences, see Andreas Schloenhardt, ‘Submission to the Inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*’, (October 7, 2009), <http://www.aph.gov.au/senate/committee/legcon_ctte/organised_crime_two/submissions.htm> and Rod Broadhurst and Julie Ayling, *Submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (October 12,

In a recent case before the High Court of Australia, *South Australia v. Totani*, it was held that parts of the *Serious and Organised Crime (Conduct) Act 2008* (S.A.), and in particular provisions relating to declared organisations triggering the applicability of control orders, were unconstitutional.⁵² Some of the reasons were that the determination of whether an organisation is a criminal-declared organisation is made by the executive, based upon criminal intelligence that is not disclosed to the courts.⁵³ Furthermore, as the court pointed out, criminal liability should be conduct based, as determined by the courts, not class or group based, as determined by the executive.⁵⁴ Therefore, in the case of control orders under the South Australian legislation, the determination of being a “member” of a declared group, made by the executive, would force the court to follow the executive’s application to issue a control order and would thereby render the court an extended arm of the executive.⁵⁵ The separation of powers would thereby be undermined and courts could no longer be considered independent or impartial, which are fundamental attributes of the rule of law concept.⁵⁶ Any decision made by the courts would not follow an individual or personal assessment of the person subject to the order, but be based on his or her group membership irrespective of achieving the purpose of protecting society from this person’s possible future criminal conduct.⁵⁷

These are just some of the criticisms in relation to the new organised crime laws in Australia and joining the chorus of concern expressed by judges, are academics, lawyers and other commentators. Similar to the new terrorism laws, the new approach to serious and organised crime in Australia and in particular the connection of the membership of a declared group to criminal offences and procedural measures has the potential to infringe civil liberties and ultimately the rule of law.

F. Conclusion

It is apparent that there has been a significant expansion of federal power in Australia in the criminal justice sphere. This has occurred through imaginative use of federal competence to legislate (particularly international treaties), through states being prepared to negotiate a referral of powers and through the promotion of uniform

2009). <http://www.aph.gov.au/senate/committee/legcon_ctte/organised_crime_two/submissions.htm>.

⁵² [2010] HCA 39.

⁵³ *ibid.*, [70] and [82], *per* French C.J.

⁵⁴ *ibid.*, [35], *per* French C.J.

⁵⁵ *ibid.*, [218], [226], [229] and [230], *per* Hayne J., and [436] *per* Crennan and Bell JJ.

⁵⁶ *ibid.*, [436], *per* Crennan and Bell JJ.

⁵⁷ *ibid.*, [478], *per* Kiefel J.

legislation across the states and territories. This process of harmonisation is particularly apparent in relation to new terrorism and organised crime offences. The lack of state and territory legislation in these areas makes a coordinated federal approach a logical step, reflecting the seriousness, and cross-border and international dimensions of these offences. However, it could equally be argued that many of these crimes may be sufficiently dealt with under conventional criminal laws available at state and territory level.

In relation to both terrorism and drugs offences, reforms were “rushed” through the parliamentary process, being kneejerk responses to incidents that attracted considerable political and media attention. The question whether these reforms are compatible with human rights and in particular the fair trial rights of the accused, will ultimately be answered by the courts. The cases outlined show that constitutional safeguards can be infringed through such legislation.

The *Totani* decision in relation to South Australian organised crime offences provides evidence of a robust and independent judicial system seeking to uphold the rule of law. However, there are limits to the power of the courts to remedy legislatively-authorised injustice, especially in a system without a national bill of rights or charter.

The potential for human rights infringements becomes apparent with some of the trends in terrorism and organised crime legislation, such as criminalising mere association and membership status. Apart from the evidential problems of proving this “status”, in particular in relation to terrorist groups, the focus of criminal liability is remote from any harmful criminal act. Moreover, these criminal acts, as exemplified in the federal organised crime legislation, can be proven outside the courtroom. The courts are left merely to decide the link between the individual and the group and not any individual responsibility. This is similar in terrorism and organised crime legislation. Neither require any link to a concrete illegal activity related to the offender.

The impact of this type of status-based criminal legislation becomes particularly apparent in *R. v. Vinayagamoorthy*.⁵⁸ Not only does the stigmatisation of particular groups give rise to political intrusions into the investigation phase, but it can further have a substantive impact on wider international relations and humanitarian assistance, whether or not the laws have extraterritorial effect. It has therefore to be hoped that the courts, in future decisions, uphold human rights and condemn improper political involvement and decisions in the investigative and pre-trial processes.

⁵⁸ See n.38.

II. INFORMATION ABOUT OPPORTUNITIES FOR LAWYERS FROM OVERSEAS TO PRACTISE IN AUSTRALIA

Like the criminal law in Australia, the practice of law is regulated in each of the states and territories individually. To find out more about opportunities for legal practice, the practitioner should therefore refer to the specific requirements in each jurisdiction.⁵⁹ Admitting authorities in the different jurisdictions are: for the Australian Capital Territory, the Northern Territory, Queensland and Western Australia, “The Legal Practitioners Admission Board”; for Victoria, the “Board of Examiners”; for Tasmania, the “Board of Legal Education”; for New South Wales, the “Legal Profession Admission Board” and for South Australia, the “Board of Examiners”. These bodies can be contacted individually to give advice relating to the particular circumstances of non-Australian trained lawyers.

The Law Admissions Consultative Committee (comprising representatives of the admitting authority in each Australian jurisdiction, the Committee of Australian Law Deans, the Australasian Professional Legal Education Council and the Law Council of Australia) issued “Uniform Principles for Assessing Qualifications of Overseas Applicants for Admission to the Australian Legal Profession” in October, 2010. This document contains general guidelines, and the practitioner is therefore warned that additional requirements may apply in the different Australian jurisdictions. It is therefore recommended to consult with the bodies enumerated above first, before relying on the “uniform principles”. The uniform principles state that an applicant must usually have:

- (i) completed a tertiary course leading to legal practice in the applicant’s home jurisdiction, which is substantially equivalent to a three-year full-time law course that leads to admission to the legal profession in Australia ; and
- (ii) successfully completed subjects, either as part of that course or otherwise, which are substantially equivalent to the areas of study which Australian applicants must successfully complete before being admitted to the legal profession in Australia; and
- (iii) acquired and demonstrated an appropriate understanding of, and competence in, certain skills, practice areas and values, which are substantially equivalent to the skills, practice areas and values which Australian applicants must acquire and

⁵⁹ See for an informative overview the website of the Law Council of Australia which is a federal body responsible for practitioner concerns <<http://www.lawcouncil.asn.au/lacc.cfm>>.

- demonstrate an understanding of and competence in, before being admitted to the legal profession in Australia; and
- (iv) undertaken, or been exempted from, the International English Language Testing System Academic Module test within two years before seeking admission, and obtained minimum scores of 8.0 for writing, 7.5 for speaking and 7.0 for reading and listening, in the components of that test.

Each of these listed requirements is subject to certain exemptions and the requirements do not apply to legal practitioners from New Zealand, whose qualifications are more easily recognised. Overseas applicants must furthermore have comparable academic qualifications leading up to the admission to practice. Higher degrees completed in Australia, such as masters and doctoral studies, are not considered relevant in the application process. An exception are Graduate Diplomas in Law undertaken in either England, Wales or Northern Ireland. Furthermore, applicants to the Australian legal profession can choose to sit the Common Professional Examination, which enables them to practise in Australian jurisdictions.

Generally, applicants from the United States, England, Wales or Northern Ireland, are subject to a number of exceptions, which make it easier to be admitted in Australia. Admission is generally easier for lawyers who have completed similar academic qualifications enabling them to be admitted to the bar and chances are increased if they have been admitted to the bar of their home jurisdiction. As a general rule, the more experienced the practitioner, the easier becomes the admission process, provided the required English language proficiency has been obtained.

CASE NOTES

THE PRIVY COUNCIL AND JAMAICA

Campbell v. The Queen [2010] UKPC 26, [2011] 2 W.L.R. 983
(November 3, 2010)

Judicial Committee of the Privy Council – Jurisdiction – Jamaica

In *Campbell*, the Privy Council ruled that it could grant a defendant from Jamaica special leave to appeal to it against his conviction for murder, even though the Jamaican Court of Appeal had refused leave to appeal to that court on the merits.

The case concerned the point-blank shooting of a policeman in a bar, and the prosecution's sole witness was another man who had been in the bar, who had known the defendant for many years. The defendant claimed he had an alibi, and that either the witness was deliberately framing him because of "bad blood" between them (the defendant was alleged to have made the witness's underage granddaughter pregnant) or it was a case of mistaken identity (because the witness was a drunkard). At the first trial, the jury were unable to reach a verdict, but the defendant was convicted at a retrial, at which point he applied for leave to appeal.

During the initial application for leave to a single judge of the Court of Appeal, counsel for the prosecution had taken the stance that there was nothing that would provide a possible ground of appeal, and the judge agreed that the application was without merit. On a renewed application for leave to appeal, the Court of Appeal stated that the trial judge had dealt adequately with the issues and that there was no ground on which the jury's verdict could be faulted. Leave was refused.

The Privy Council disagreed. In the result, the board suggested that the case be remitted to the Court of Appeal with a direction to quash the jury's verdict and determine whether or not to order a (second) retrial. On the substantive issues, the failure to give the defendant a good character direction to which he was entitled, in circumstances where the credibility and reliability of the witness's identification stood alone against his own credibility, deprived him of the benefit of such a direction in precisely the kind of case where it should be regarded as being of greatest potential significance.

The absence of a good character direction was attributed to the incompetence of the defendant's trial lawyer (deceased by the time of the Privy Council judgment), not the judge, and, in the process of ruling the conviction unsafe the board made the point that it will not

usually entertain a ground of appeal based upon allegations of incompetence that have not been raised at an earlier stage in the proceedings. The exceptional circumstances of the case, however, which included “unfocused and disordered conduct by counsel”, “large numbers of impermissible questions as well as ... inappropriate applications and submissions, leading to a number of judicial reproofs”, and a history of earlier disbarment from the Bar of England and Wales on charges of professional misconduct, racial bias, and intemperate and immoderate language, compelled the conclusion that the incompetence of counsel was the only plausible explanation for the failure.

Both on the facts and the conduct of the proceedings, this was a remarkable case. From a Commonwealth point of view, however, it is the way in which the board dealt with the issue of jurisdiction that is particularly interesting. Delivering the unanimous opinion of the board, Lord Mance first recognised that local legislation may restrict the right to special leave expressly or by necessary implication. He next considered section 110(3) of the *Constitution of Jamaica*, which states that “Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any ... criminal matter”. He noted that section 110(3) was intended to preserve (rather than grant) the right to seek special leave in circumstances where there had been a decision of the Jamaican Court of Appeal, but that the right was not limited to the provisions of section 110(3). The language of section 110 as a whole could not be said to “make clear an intention to exclude in other respects the right to seek special leave” contained in section 3 of the *Judicial Committee Act* 1833 and section 1 of the *Judicial Committee Act* 1844.

Given the breadth of the prerogative power to grant special leave expressed in both sections of the Acts of 1833 and 1844, Lord Mance was in no doubt that these permitted the grant of special leave, even where the only decision of the domestic court had been to refuse to hear an appeal.

The relationship between the Privy Council and the Caribbean Commonwealth states has been difficult for a number of years. In 1970, a Jamaican delegation at the Sixth Heads of Government Conference proposed the establishment of a Caribbean Court of Appeal in substitution for the judicial committee of the Privy Council. And it was the Jamaican case of *Pratt and another v. Att.-Gen. for Jamaica and another*¹, in 1993, that is often seen as a major contributing factor both to the unpopularity of the Privy Council in the region, and to the eventual establishment of a Caribbean Court of Justice in 2001.

¹ [1994] 2 A.C. 1.

In that case, the Privy Council decided that offenders imprisoned on death row for more than five years should have their sentences commuted to life imprisonment, despite local opposition.

On the one hand, as the website of the Caribbean Court of Justice itself admits, “Opinions are divided on the need for, or desirability of, the Caribbean Court of Justice.”²; and, despite that court’s jurisdiction as an appellate court of last resort for some states, the Privy Council remains the highest court of appeal for most Caribbean Commonwealth states, including Jamaica. On the other, it must be open to question how long the sovereign states of the Caribbean will be prepared to countenance the intrusion of the Privy Council if it continues to make decisions that (rightly or wrongly) fly so obviously in the face of regional determination.

“The fact that a domestic court of appeal has refused leave to appeal to it will,” said Lord Mance in *Campbell*, “always be a relevant, and often no doubt decisive, consideration for the Board to consider when deciding whether or not to grant special leave.” Whether this will provide sufficient comfort for twenty-first century Jamaica, or for the rest of the Caribbean Commonwealth, remains to be seen.

DEBORAH COLBRAN ESPADA.*

COMPLAINANTS WHO STOP COMPLAINING:
BEING PROSECUTED FOR WITHDRAWING AN ALLEGATION

Dushkar Kanchan Singh v. The Queen [2010] NZSC 161 (December 17, 2010)
Supreme Court of New Zealand

R. v. A. [2010] EWCA Crim. 2913 (November 23, 2010)
Court of Appeal (Criminal Division), United Kingdom

Domestic abuse – Perverting the course of justice – Privilege

Few complainants can be in a less enviable position than the woman who makes an allegation of physical or sexual violence against her partner. Two recent cases, one from New Zealand and one from the United Kingdom, demonstrate how easily such a woman can become caught in a tug of war between her partner and the Crown. The partner will illegitimately pressurise the complainant to drop her allegations, while the Crown, in the aim of securing a conviction, will

² <<http://www.caribbeancourtsofjustice.org/about2.htm>> last accessed at May 16, 2011.

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do everything within its power to ensure that the woman pursues the charges and gives evidence. The result is that the woman is straight-jacketed into continuing with her allegations: as the New Zealand case shows, the scope for pulling out once the train is in motion is limited; and as the United Kingdom case illustrates, if the woman does drop her allegations, she is exposed to prosecution for perverting the course of justice. This is an unsatisfactory state of affairs, as is being gradually acknowledged in the United Kingdom.

In *Dushkar Kanchan Singh v. The Queen* [2010] NZSC 161 (December 17, 2010), the New Zealand courts were faced with the question of whether a complainant in a domestic abuse case, who has changed her mind about wanting to see her partner prosecuted, can refuse to give evidence in court by claiming the privilege against self-incrimination, on the basis that if she were to give evidence at trial, she would contradict earlier statements made by her, and would therefore be liable to prosecution for perjury, making a false complaint, wasting police time, or other similar offences.

The defendant was a police officer, and met and became engaged to the victim, Ms D, in early 2006. In that year, the Crown alleged that the appellant assaulted Ms D on 19 occasions. Having initially given evidence against the defendant at a preliminary hearing, Ms D then changed course and attempted to derail the prosecution: she swore an affidavit in May, 2007, seeking to be excused from giving evidence at trial, and she told the police in January, 2008, that she intended to leave the country (showing just how desperate complainants can become to stop prosecutions). This proved to be counterproductive, because Ms D was arrested and compelled to give evidence.

Ms D attempted to rely on the privilege against self-incrimination in order to avoid giving evidence against her partner. This was rejected by the judge, who permitted her to be cross-examined by the Crown as a hostile witness. The jury found the defendant guilty on five counts of violence, seemingly convicting him on those counts where there was independent evidence inculpating him, but acquitting him on those counts where the only evidence was what Ms D had said in her earlier depositions. The jury also found that, by pressurising Ms D to drop her allegations, the defendant wilfully perverted the course of justice.

The argument that Ms D was wrongly denied the right to claim privilege was raised by the defendant on his appeal against conviction, rather than by Ms D herself. This in itself meant that the appeal could never succeed: as noted by the court, it is only the witness who can rely on the privilege – it is a personal right that cannot be relied upon by any other party. Fortunately for the exploration of this area

of the law, the court nevertheless went on to examine whether or not the decision to reject Ms D's claim to privilege was correct.

The court held that the judge had been right to deny Ms D's claim for privilege against self-incrimination. Ms D's first argument was that if she gave evidence at trial, she would repeat the inculpatory statements she made at the preliminary hearing, and, since she now claimed that these statements were false, would expose herself to prosecution for perjury. This argument so lacked legal merit that it was not pursued by counsel: the privilege against self-incrimination can only attach to past offending, and Ms D's argument, if right, would mean that any witness could avoid giving evidence by claiming that if he takes the witness stand, he will lie, commit perjury, and thereby risk prosecution.

It was only open to Ms D to base her claim for privilege on her earlier statements, rather than what she might say at trial. As Ms D had made statements both inculpatory and exculpatory of the defendant, she could theoretically be prosecuted whichever stance she took at trial. If she gave evidence against the defendant, it would mean that the statements in which she denied her earlier allegations would be exposed as false, and this would amount to perverting the course of justice by withdrawing a true complaint. If Ms D maintained, at trial, her position that the defendant was innocent, she would demonstrate herself to have been guilty of making false allegations.

Despite the fact that the possibility of prosecution did, in theory, exist, the Supreme Court held that a prosecution was insufficiently likely so as to allow a claim for privilege against self-incrimination. Section 60(1)(b) of the *Evidence Act* 2006, which enshrines the privilege in statute, allows a person to claim it where giving evidence would be "likely to incriminate the person". The court stated that the use of the word "likely" showed that the legislature intended to confine the privilege to circumstances where the risk of a prosecution was "real and appreciable", and not "merely imaginary and fanciful". The likelihood of prosecution in this case was not sufficiently strong, because if Ms D gave exculpatory evidence at trial, the Crown would not prosecute her in respect of her initial, inculpatory statements, as the Crown's case was that those statements were true. If, on the contrary, Ms D gave evidence tending to show the offender's guilt, the Crown would not mount a prosecution in respect of Ms D's earlier attempts to withdraw her allegations, because the Crown's stance was that those retractions were made under illegitimate pressure from the offender.

The result, for Mr Singh, was that his convictions stood, and this is unobjectionable: it would have been unacceptable for him to have won an appeal on the basis of an error made by the court in relation

to his victim. But for Ms D, and women in her position, the result is exposure to prosecution – the court expressly noted that a prosecution was possible in respect of the exculpatory evidence given by Ms D at trial, on the basis that it was inconsistent with her initial, truthful allegations.

In a recent case in England and Wales, *R. v. A.* ([2010] EWCA Crim. 2913), such a risk became reality. The complainant had been with her husband for nine years, and married to him for five. In November, 2009, she reported that she had been raped by him. She was examined by a forensic medical examiner and interviewed, following which the husband was charged with six counts of rape, ranging from anal to vaginal and oral rape. In January, 2010, she contacted the police and the prosecution to say that she wanted to retract her complaint, though she maintained that her allegations were true. She was told that the prosecution would proceed, to which she responded by contacting the police and changing her position, now claiming that her allegations of rape were false. The prosecution had no option but to offer no evidence against the defendant, and not guilty verdicts were accordingly entered against him. In a discussion with the prosecution, the complainant admitted that she had falsely retracted her allegations: she had been in a confused and emotional state, having been the victim of domestic abuse for years, and, having been told by an acquaintance that if he were convicted, the husband would be sentenced to 10 years' imprisonment, she had felt an immense sense of guilt at having pursued the allegations. She wanted to arrange a family Christmas at which her children and her husband would be present, and she now felt that serving divorce papers on her husband would be enough. Facing an indictment alleging that she perverted the course of justice, she pleaded guilty to falsely retracting her allegations, and was sentenced to eight months' imprisonment. She appealed against that sentence to the Court of Appeal (Criminal Division). Judgment was delivered by the Lord Chief Justice, Lord Judge, and constitutes an important re-appraisal of the propriety of prosecuting a woman in the appellant's position.

The court noted that a complaint that an individual has been a victim of crime is not a purely private matter: "Every crime engages the community at large." Since there is a "distinct public interest in the investigation", the retraction of a truthful allegation can constitute a serious offence. However, the court emphasised that it should "be guided by a broad measure of compassion for a woman who has already been victimised", and recognised that women victims of domestic abuse are vulnerable and susceptible to pressure from their partners. The court signalled that a prosecution in such circumstances should be exceptional, and reduced the appellant's sentence to a community sentence. Within two months of the

decision, the Crown Prosecution Service (C.P.S.) responded to the Lord Chief Justice's signal, and issued interim guidance that drew specifically on his remarks. The guidance states that a prosecution for retracting a truthful allegation is less likely to be in the public interest, and therefore less likely to be pursued, where, amongst other factors, (i) the person retracting the allegation has been threatened or pressurised into doing so by the suspect of the original allegation, his or her family, friends or other persons, and (ii) there is a history of abuse or domestic violence or intimidation.

Over time, the criminal law has advanced considerably in its appreciation of violence in the domestic context. A landmark step in this direction was the decision of the House of Lords in *R. v. R.* [1992] 1 AC 599, which ended the marital rape exemption that, based on the fiction that a woman's consent to intercourse with her husband could be implied from her being married to him, operated to protect husbands from prosecution for rape. The cases above demonstrate just how far the scales have tipped the other way, with prosecutions not only of men who perpetrate violence on their partners, but of women who are pressurised into dropping their allegations. The Lord Chief Justice's judgment in *R. v. A.* and the C.P.S.'s subsequent guidance are signs that we may be finally arriving at a golden mean.

ANDREW BERSHADSKI.*

MERE MEMBERSHIP OF A BANNED ORGANISATION CANNOT CARRY CRIMINAL LIABILITY

Arup Bhuyan v. State of Assam [2011] INSC 100 (February 3, 2011)
Sri Indra Das v. State of Assam [2011] INSC 125 (February 10, 2011)
Supreme Court of India

Freedom of association – Freedom of speech – Guilt by association

Both appellants were charged under section 3(5) of the Indian *Terrorist and Disruptive Activities (Prevention) Act 1987* ("the 1987 Act"), which made it an offence to be "a member of a terrorist gang or a terrorist organisation, which is involved in terrorist acts," carrying a minimum sentence of five years' imprisonment (up to a maximum sentence of life imprisonment) and a fine. This offence now forms

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part of section 10 of the Indian *Unlawful Activities (Prevention) Act* 1967 (“the 1967 Act”). They were accused of membership of the United Liberation Front of Assam (ULFA), declared to be a “terrorist organisation” under the 1967 Act, ss.3 and 35, and listed in the schedule thereto.

In its judgments, the Supreme Court of India (*coram*: Markandey Katju J., Gyan Sudha Misra J.) held that membership of a banned organisation, without more, cannot carry criminal sanction.

The Facts

Sri Indra Das was arrested in connection with the death of Anil Kumar Das, who disappeared in November 1991. Although not mentioned in the first investigation report, Sri Indra Das later made a confession to the police, admitting the murder, and membership of a banned organisation, which confession he later withdrew. The charge sheet was only filed nine years after the victim’s death, and the charges framed over four years thereafter. As there was no corroboration of the confession, Indian law precluded pursuit of a charge of murder (*post*). The facts of the first case are not laid out in the Supreme Court’s judgment.

Both appellants were convicted of offences contrary to section 3(5) of the 1987 Act. Sri Indra Das was sentenced to five years’ rigorous imprisonment (hard labour), and a fine of Rs.2000. No information is given as to the sentence in the first case, but, as noted, the minimum sentence was five years’ imprisonment. Both appealed their convictions.

Confessions and Terrorism Offences

The charges were based solely on confessions made to police officers by the accused. Confessions made to a police officer, or whilst in police custody, are not normally admissible, under sections 25 and 26 of the Indian *Evidence Act* 1872. However, by virtue of section 15 of the 1987 Act, such confessions were admissible for offences under that Act. In *Arup Bhuyan*, however, the Supreme Court emphasised that confessions to the police, in India, are particularly unreliable evidence, stating that they are often extracted by means of torture – and “a person [...] under torture ... will confess to almost any crime”. In both cases, the court held that convictions on the basis of unsupported confessions to the police are unsafe.

Rejecting “Guilt by Association”

The Justices (Katju and Misra JJ.), building on their earlier judgment in *State of Kerala v. Raneef* [2011] 1 S.C.A.I.E. 8 (Supreme Court of India, January 3, 2011), ruled against “guilt by association”.

Raneef was an appeal against the denial of bail to the defendant under section 43D(5) of the 1967 Act (“the accused shall not be released on bail if the Court, on perusal of the case diary ... is of the opinion that there are reasonable grounds for believing that the accusation ... is *prima facie* true”: *Raneef*, [7]). The defendant was a dentist who sutured the wound on the back of a man allegedly involved in a violent attack. Both *Raneef* and the injured man were members of the Popular Front of India (P.F.I.), a Muslim organisation, but not one designated under the 1967 Act. *Raneef* was charged with conspiring to participate in the attack, allegedly founded on his membership of the P.F.I. As the P.F.I. is not banned, the court held that *Raneef* could not be penalised merely for belonging to it. However, the court further posited that, even if it were shown to be involved in unlawful activities, the fact that the defendant was a member of that organisation would not bring him within section 43D(5). In so doing, it adopted Justice Douglas’s judgment in the United States Supreme Court case of *Elbrandt v. Russell* 384 U.S. 11 (1966):

“A law which [criminalises] membership without the ‘specific intent’ to further the illegal aims of the organisation infringes unnecessarily on protected freedoms. It rests on the doctrine of ‘guilt by association’ which has no place here.”

In both *Arup Bhuyan* and *Sri Indra Das*, the court adopted this reasoning, and cited various other United States Supreme Court cases from the McCarthy era. The court’s analysis of *Brandenburg v. State of Ohio* 395 U.S. 444 (1969) in *Arup Bhuyan* is particularly clear:

“[in this case,] the United States Supreme Court went further and held that mere ‘advocacy or teaching the duty, necessity, or propriety’ of violence as a means of accomplishing political or industrial reform, or publishing or circulating or displaying any book or paper containing such advocacy, or justifying the commission of violent acts with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism, or to voluntarily assemble with a group formed ‘to teach or advocate the doctrines of criminal syndicalism’ is not *per se* illegal. *It will become illegal only if it incites to imminent lawless action.*” [Emphasis mine.]

The court then turned to statutory interpretation in light of the Indian Constitution. It cited the approach it had previously adopted to the offence of sedition, in *Kedar Nath v. State of Bihar* [1962] S.C.R.

Supl. (2) 769, at 809: where a provision may be read as compatible with the Indian Constitution, this reading must be adopted in preference to one which would be unconstitutional; and sedition legislation was aimed “at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence” (*Kedar Nath*, [26], quoted in *Sri Indra Das*, [29]). The court applied this reasoning to the criminalisation of membership of banned organisations, reading section 3(5) of the 1987 Act down such that “mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence” (*Arup Bhuyan*, [15]).

A Principled Volte-Face

Although not explicitly put, these cases represent a reversal of previous case-law on anti-terrorism legislation. In *Kartar Singh v. State of Punjab* [1994] (3) S.C.C. 569, the Supreme Court had examined the 1987 Act, among other anti-terrorist laws, including the “membership” offence at issue in the present cases (see [141]). The court held these laws not to have been *ultra vires* (at [78]), and confirmed the constitutionality of the 1987 Act in its entirety (at [148]). The judgment is suffused with a concern over terrorism’s fundamental opposition to the state. The court recognises (at [145]) that “the Act tends to be very harsh and drastic containing ... stringent provisions ... minimum punishments and ... enhanced penalties”, but sees this “drastic change” as justified, given the manner in which “terrorists and disruptionists ... create terror and a sense of insecurity in the minds of the people”.

These new cases surely chart a better approach: no matter how heinous the alleged crime, a defendant’s fundamental rights must not be set aside, and no court must allow itself to be cowed into doing so because of the general fear that such defendants’ alleged actions engender.

A Brief Comparison with the ‘Membership’ Offence in the United Kingdom

The United Kingdom membership offence is found in the *Terrorism Act* 2000, s.11: “A person commits an offence if he belongs or professes to belong to a proscribed organisation”, unless he can show that the organisation was not proscribed at the time of his joining, and he has not participated in its activities since its proscription. In *R. v. Ahmed (Rangzieb)* [2011] EWCA Crim. 184 (February 25, 2011), the Court of Appeal court held that what amounts to “membership” is likely to depend upon the nature of the organisation in question: “Membership of a loose and unstructured organisation may not

require any formal steps ... [and a] criminal association is inherently more likely to lack formality than an innocent one" (at [87]). The court accepted (at [89]) that the "core elements" of membership under section 11 are "voluntary and knowing association with others with a view to furthering the aims of the proscribed organisation"; however, although participation in activities may be a clear indication of membership, "unilateral sympathy with the aims of an organisation, even coupled with acts designed to promote similar objectives, will, whilst being clear evidence of belonging, not always be sufficient" to found a charge under this provision.

This analysis is helpful, but it does not address the fundamental underlying problem with membership offences. The criminalisation of mere membership of an organisation – no matter how heinous its objects – without the specific intent to promote or incite immediate, unlawful action, is fundamentally illiberal, and mistaken. The Supreme Court of India is to be commended on their courageous defence of the freedom of association, much as their American brothers held back the worst excesses of McCarthyism.

ATLI STANNARD.*

REDUCTION IN SENTENCE FOR A GUILTY PLEA: THE NEW ZEALAND SUPREME COURT REJECTS A SLIDING-SCALE APPROACH

Hessell v. R. [2011] 1 N.Z.L.R. 607 (November 16, 2010)

Supreme Court of New Zealand

Hessell v. R. [2010] 2 N.Z.L.R. 298 (October 2, 2009)

Court of Appeal of New Zealand

Guilty plea – Discount in sentence – Judicial discretion

*In the absence of a Sentencing Council in New Zealand,
the Court of Appeal steps in*

In July 2007, the New Zealand Parliament enacted the *Sentencing Council Act* 2007, establishing a Sentencing Council to issue sentencing guidelines, modelled on the English Sentencing Guidelines Council (now the Sentencing Council for England and Wales – see the *Coroners and Justice Act* 2009, Pt 4, Chap. 1). However, the new government elected in 2008 did not support the concept of a non-judicial body fixing sentencing guidelines. As no Sentencing Council

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was forthcoming, New Zealand's second highest court, the Court of Appeal, took matters into its own hands. A "suitable case" was selected for a guideline judgment on discounts for guilty pleas. That case was *Hessell v. R.* [2010] 2 N.Z.L.R. 298, an appeal from a sentence (of two years and eight months) handed down by the High Court for sexual offences, in which the defendant had received a 10 per cent discount for his guilty plea on the last working day before the first day of trial.

The Court of Appeal explained that, as the *Sentencing Act* 2002 insists on a highly structured approach to sentencing, there was a need to review the unfettered discretion traditionally accorded to sentencing judges in New Zealand in respect of discounts for guilty pleas. Like the English Sentencing Guidelines Council, the Court of Appeal adopted a sliding scale for sentencing judges to apply. A reduction of 33 per cent of the otherwise appropriate sentence was warranted if a willingness to plead guilty was communicated at the first reasonable opportunity; 20 per cent if this happened after the first reasonable opportunity and a status hearing for summary proceedings or at first call-over after committal in cases proceeding on indictment; and 10 per cent if communicated three weeks before the commencement of the trial (see [15]). A small reduction of less than 10 per cent could be warranted if a guilty plea was entered after the commencement of the trial ([18]). The discount was to be applied as the last step of the sentencing exercise, making clear what the sentence would otherwise have been.

Unlike the English model, remorse (apart from "exceptional" remorse) would not count as separate mitigating factor, because such a discount was, to some extent, automatically built in as part of the discount for a guilty plea (see [25]). Also in contrast to the English model, there was to be no reduction in the discount given because the prosecution case was strong, as judging the strength of the prosecution case was difficult, and certainty was required, both for defence lawyers and their clients, and for busy judges ([38]).

*The sliding scale is rejected by the Supreme Court
in favour of a discretion capped at 25 per cent*

The case was appealed to the Supreme Court, which gave judgment on November 16, 2010: *Hessell v. R.* [2011] 1 N.Z.L.R. 607. The Supreme Court noted (at [35]) that the 2002 Act contained, for the first time in a New Zealand statute, a comprehensive statement of sentencing purposes and principles; but it did not agree that the Act required a departure from the approach that the application of punishment for offending remained an evaluative task for judges, balancing sentencing discretion with sentencing consistency (at [43],

[44]). The Supreme Court's "difficulty of principle" with the Court of Appeal's sliding-scale approach was that it put aside factors of apparent relevance to the mitigating weight that should be given to a guilty plea (at [53]). Allowance for a guilty plea, the court said, should be given after an evaluation of all the circumstances in which the plea was entered, not just when it was entered.

Sitting as a mitigating factor in a non-exhaustive list with six other mitigating factors, section 9(2)(b) of the 2002 Act requires a sentencing judge to take into account, "whether and when the offender pleaded guilty". The policy behind section 9(2)(b), the Supreme Court said, reflected the benefits that a guilty plea delivers to the administration of justice and to those who must otherwise participate in the trial process. A guilty plea avoids a trial, which produces benefits such as savings in public expenditure (costs associated with trials) and demands on state resources (reduction in the back-log of trials), and benefits for witnesses, particularly victims, who are spared the stress of giving evidence, and who may be assisted by the offender's acknowledgement of responsibility (see [45]). These benefits justified giving an incentive to plead guilty; but a system that went too far and incentivised innocent people to plead guilty risked infringing human rights (see [46]). The *New Zealand Bill of Rights Act* 1990 explicitly protected the rights of a person charged with an offence, (i) to be presumed innocent until proved guilty according to law (s.25(c)), (ii) not to be compelled to confess guilt (s.25(d)), and (iii) to a fair and public hearing by an independent and impartial court (s.25(a)).

One of the factors that had been put aside by the Court of Appeal, in its sliding scale, was the strength of the prosecution case. But the strength of the case against a defendant is, said the Supreme Court, an important factor in evaluating the extent to which a plea involves acceptance of responsibility. Further, an approach where the maximum discount must be given where a plea is given promptly, no matter the strength of the prosecution case, carried the unacceptable risk that an accused who was not guilty would plead guilty to the offence charged (see [60], [72]).

Another factor that the Court of Appeal thought ought to be ignored was remorse, unless "exceptional". However, this was at odds with section 9(2)(f) of the 2002 Act, which identified remorse shown by the offender as a mandatory mitigating factor. For the Supreme Court, remorse was not shown simply by a guilty plea. Where a proper and robust evaluation by the judge showed that the defendant was genuinely remorseful – not just, for example, feeling sorry for himself – then separate credit for this mitigating feature should be given (see [64]).

The Court of Appeal's approach required an accused, in order to get the maximum discount, to plead guilty even where he disagreed with the prosecution's summary of facts, leaving the disagreement to be resolved as part of the sentencing process, at a subsequent disputed facts hearing. This, said the Supreme Court (at [61]), was too rigid. And what about the situation where the defendant agrees to plead guilty to a lesser charge in return for the prosecution dropping a more serious one? The accused has already received a benefit for his guilty plea; a discount in sentence based purely on when it was entered may lead to him receiving a double benefit ([62]). Instead, sentencing judges should be required to evaluate all the variable circumstances of individual cases that are relevant to a guilty plea, and given the scope to award appropriate recognition based on the conclusion reached.

While the Supreme Court thought that there were advantages in addressing a discount for a guilty plea once all other matters had been considered, and a provisional sentence decided upon, the allowance that could and should be given for a guilty plea had to reflect all the circumstances in which the plea was entered (see [73], [74]). Because remorse was to be dealt with separately, the upper limit of the discount for a guilty plea was 25 per cent of the otherwise appropriate sentence ([75]). Whether the accused pleaded guilty at the first reasonable opportunity was always relevant, but when that opportunity arose was a matter for particular inquiry. A plea could reasonably be seen as "early" where the accused pleaded as soon as he had the opportunity to be informed of all implications of the plea (see [75]).

The Court of Appeal had been persuaded by the reasoning of law reform agencies in the United Kingdom and in New Zealand, which had recommended moving to a more prescriptive and structured approach. The Supreme Court, on the other hand, thought the Court of Appeal's approach inappropriate, as it restricted the capacity of judges to determine sentences that were considered to fit all the circumstances of the case, and was not mandated by the 2002 Act (at [67]). But what of the "suitable case" that had made this debate possible? Here, at least, was an aspect of the Court of Appeal's judgment with which the Supreme Court agreed. Mr Hessel had received a 10 per cent discount for a very late plea, and this reduction was within the High Court judge's sentencing discretion ([78]). His appeal, along with Court of Appeal's sliding scale, was dismissed.

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COMPENSATION FOR MISCARRIAGES OF JUSTICE

R. (*Adams*) v. Secretary of State for Justice; Re MacDermott's and McCartney's Applications [2011] UKSC 18, *The Times*, May 12, 2011 (May 11, 2011)

Supreme Court of the United Kingdom

Appeal – Compensation – Miscarriage of justice

A. Background

Andrew Adams was convicted of murder in 1993 by a judge and jury sitting in the Crown Court, and was sentenced to life imprisonment. At trial, he had argued that the principal prosecution witness had colluded with two police officers to give false testimony against him. An appeal against conviction was refused in 1998, but in 2007 his conviction was quashed on a reference by the Criminal Cases Review Commission, as it was discovered that information that would have greatly assisted in cross-examination of the crucial witnesses had been missed by his defence team. He applied for compensation from the Secretary of State for Justice but his application was refused. He brought judicial review proceedings but was unsuccessful in the English High Court and Court of Appeal.

Eamonn MacDermott and Raymond McCartney were convicted in 1979 by a judge sitting alone at the Belfast City Commission of various offences, including the murder of a police officer, and were both sentenced to life imprisonment. They had argued at trial that admissions said to have been made by them in police interview were either concocted or the result of ill-treatment by officers. Appeals against conviction were refused in 1982, but their convictions were quashed in 2007 on a reference by the Criminal Cases Review Commission, it having emerged that senior prosecution officials had accepted that the officers who had questioned them had assaulted another suspect in the same investigation. They applied for compensation from the Secretary of State for Northern Ireland, but their applications were refused. They too brought judicial review proceedings, and were unsuccessful in the Northern Irish High Court and Court of Appeal.

A nine-judge constitution of the Supreme Court of the United Kingdom (Lord Phillips P.S.C., Lord Judge C.J., Lord Hope D.P.S.C., Lord Rodger, Lord Walker, Lady Hale, Lord Brown, Lord Kerr and Lord Clarke JJ.S.C.) considered appeals in both these cases together.

B. Legislation

The provision in United Kingdom law under consideration was section 133 of the *Criminal Justice Act* 1988, subsection (1) of which provides:

“... when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction ... unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.”

This provision was enacted to give effect to the United Kingdom's obligations under the *International Covenant on Civil and Political Rights* 1966, Article 14(6) of which provides:

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”

Section 133 initially existed alongside an *ex gratia* payment scheme operated by the Home Secretary after the ratification of the covenant by the United Kingdom in 1976, but after the termination of this scheme in 2006 it has provided the only route by which compensation could be claimed following a miscarriage of justice. It only applies in cases where a conviction has been quashed on an appeal out of time or on a reference by the Criminal Cases Review Commission, and not where a defendant has been acquitted at trial or where his conviction has been quashed on an appeal within time.

C. ‘Miscarriage of Justice’

In considering what constituted a “miscarriage of justice”, the court examined various aids to interpretation, including the wording of Article 14(6) in both English and French, the *travaux préparatoires*, subsequent practice in countries that had ratified the covenant, the judgment of the British House of Lords in *R. (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 14, [2005] 1 A.C. 1, and statements made in Parliament in the debates leading to the

enactment of section 133. It found none of these of much assistance, and held that a fresh approach was needed.

In particular, it considered the four categories of potential miscarriages of justice set out by Dyson L.J. in the Court of Appeal judgment in *Adams*, *viz.*:

- (i) where fresh evidence shows clearly that a defendant is innocent of the crime of which he has been convicted;
- (ii) where fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant;
- (iii) where fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant; and
- (iv) where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted (although some doubt was expressed as to whether this was a standalone category).

By a majority of five to four (per Lords Phillips, Hope, Kerr and Clarke and Lady Hale), it was held that section 133 should not be restricted to category (i), but that it should not encompass categories (iii) and (iv). However, it was not satisfied with the wording of category (ii), and instead adopted what Lord Phillips described as a “more robust” test: “A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it.” It held that this test was consistent with the presumption of innocence as guaranteed by Article 6(2) of the European Convention on Human Rights.

The view of the minority (*viz.* Lords Judge, Rodger, Walker and Brown) was that section 133 should apply only to category (i), in particular on the basis that the new or newly discovered fact should demonstrate not only that the conviction was unsafe, or that the investigative or trial processes were defective, but that justice had surely miscarried, the ultimate hallmark of a miscarriage of justice being the conviction and incarceration of the truly innocent. It was also seen as vitally important by several judges that compensation not be paid out to anyone who was in fact guilty.

D. “New or Newly Discovered Fact”

As to what constituted a “new or newly discovered fact”, the court was more divided. A minority (*viz.* Lords Phillips and Kerr and Lady Hale) adopted the definition of “newly-discovered fact” in section 9(6) of the Irish *Criminal Procedure Act* 1993 (section 9 of that Act

giving effect to Article 14(6) in the Republic of Ireland), *viz.* “a fact which was discovered by him or came to his notice after the relevant appeal proceedings had been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings”.

A larger minority (*viz.* Lords Judge, Rodger, Walker and Brown) adopted the same approach as applies in circumstances where a defendant seeks to deploy fresh evidence on appeal, *i.e.* the test under section 23 of the *Criminal Appeal Act* 1968, which normally predicates that there should be a reasonable explanation for the earlier failure to adduce the evidence at trial.

Lord Clarke held that the term could include facts known to the defendant or to his legal advisers at trial or on appeal, and that the relevant knowledge was that of the trial court, but did not decide upon a test to be applied. Lord Hope, on the other hand, held that the term excluded facts which had been disclosed to the defence and which were therefore knowable, even if not in fact known.

E. Outcome

All nine judges were agreed that the appeal in the case of *Adams* should be dismissed, but by a majority the appeal in *MacDermott and McCartney* was allowed (the majority finding that it fell within the “more robust” reworded category (ii) test put forward by Lord Phillips). The minority would have remitted the latter case to the Secretary of State for further consideration.

F. Comment

One of the issues considered by the court was whether an appeal court, when allowing an appeal, is obliged or entitled to declare that the defendant is in fact innocent. Lord Phillips (at [45]) agreed with the opinion of Lloyd L.J. in the English Court of Appeal in *R. v. McIlkenny*, (1991) 93 Cr.App.R. 287, that the court was not so entitled, and cited with approval the policy justification for this rule put forward by the Court of Appeal for Ontario in *R. v. Mullins-Johnson* [2007] ONCA 720, (2007) 87 O.R. (3d) 425, *viz.* that there should not, in effect, be introduced a third verdict in addition to “guilty” and “not guilty” of “factually innocent”, as it would degrade the acquittals of those against whom the charges had simply not been proved, and would effectively create two classes of acquitted defendants: those found to be factually innocent and those who had benefitted from the presumption of innocence. However, the question was not firmly decided: of the other judges, only Lords Kerr and Judge expressed clear opinions, the former (at [172]) agreeing with Lord Phillips and the latter (at [251]) coming to the opposite view.

In considering that question, Lords Phillips and Kerr (at [47] and [173] respectively) examined the position in New Zealand, and cited the New Zealand Law Commission's 1998 report "Compensating the Wrongly Convicted", which proposed that proof of innocence be required before compensation was paid out, and recommended that a tribunal be set up to determine this issue. In fact, the New Zealand Government has now implemented guidelines providing for *ex gratia* payments, those guidelines requiring proof of innocence not beyond reasonable doubt but on the balance of probabilities. Lord Kerr (at [173]) also considered the situation in Canada, where, similarly, there are guidelines providing for *ex gratia* payments, those guidelines again requiring proof of innocence, and noted that Canada had been found in breach of the Covenant by the United Nations Human Rights Committee for failing to establish a procedure for determining whether an applicant was indeed innocent.

The situation in Australia, not referred to by the court, where all jurisdictions (save the Australian Capital Territory, where a statutory scheme exists) may make *ex gratia* payments, but where no standards or guidelines have been published, was addressed by the Australian Institute of Criminology's 2008 paper "Compensation for wrongful convictions", which recommended the implementation of similar legislation or guidelines, and which appears to have operated on the assumption that a "wrongful conviction" is one where a person who is factually innocent has been convicted. Accordingly, as a result of this judgment, the United Kingdom would seem to have instituted a more generous scheme than several other Commonwealth jurisdictions.

As to the decision itself, it is unfortunate, particularly given the problems the court encountered in analysing *Mullen* (in which the House of Lords came to a practical decision on the facts of the case but failed to set out any clear or agreed principles to be applied in future cases), that it failed to come to agreement on some of the central aspects of this case. Although there was unanimous agreement that the appeal in *Adams* should be dismissed, there was no majority as to the basis of that dismissal (four judges holding that it should be dismissed because it did not fall within the reworded category (ii), another four because it did not fall within category (i), and Lord Hope because the material on the basis of which the conviction had been quashed was not a "new or newly discovered fact"). Furthermore, there was no majority at all on the meaning of "new or newly discovered fact", with two groups of three and four judges each adopting two different but similar statutory tests, Lord Clarke essentially failing to decide upon any test and Lord Hope going down a route all of his own. It must be doubtful whether

this judgment will constitute the last word on section 133, with the likelihood being that the court will sooner or later find itself revisiting the issues it failed to decide.

PETER FITZGERALD.*

A TRIO OF CASES, A TRIO OF OPINIONS:
THE RIGHT OF ACCESS TO COUNSEL
IN CANADA'S POLICE STATIONS

R. v. *Sinclair*, 2010 SCC 35, 259 C.C.C. (3d) 443
R. v. *McCrimmon*, 2010 SCC 36, 259 C.C.C. (3d) 515
R. v. *Willier*, 2010 SCC 37, 259 C.C.C. (3d) 536
(October 8, 2010)
Supreme Court of Canada

Right to silence – Right to instruct and retain counsel – Police interviews

When the police obtain a confession from a suspect in interview, the prosecution will be anxious to get it in front of the court. Legal argument over whether such a confession is admissible will often be crucial in deciding the outcome of the case, and competent defence counsel will examine the minutiae of the interactions between the defendant and police officers to see whether there is any basis for having the confession excluded. On May 12, 2009, the Supreme Court of Canada heard three cases, all of which turned on the issue of whether, where the defendant requested access to a lawyer but was denied it, his subsequent confession should have been excluded. The judgments, and manifold dissenting reasons, were all delivered on October 8, 2010, and demonstrate a highly divergent range of opinions in Canada's highest court as to the meaning of section 10(b) of the *Canadian Charter of Rights and Freedoms* ("the Charter") - "Everyone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right." Three distinct positions were adopted by members of the court. Using the author's own labels, these will be referred to as the "restrictive position", the "intermediate position" and the "expansive position". *Sinclair* contains the fullest expression of these views, and is therefore the case on which this note is based.

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The facts

Mr Sinclair was charged with second-degree murder. Upon being arrested, he was told that he had the right to remain silent (enshrined in section 7 of the Charter), that he could instruct any lawyer he wanted without delay, and that a legal aid lawyer could be made available to him. Before being interviewed, Sinclair spoke, on two occasions, by telephone and for three minutes each time, to a lawyer whom he had previously instructed on an unrelated charge. When the interview began, Sinclair was reminded of his right to silence, and informed that the interview would be recorded and could be used in court. During the course of the interview, he made numerous further requests to speak to his lawyer. These were all denied, with Sinclair being told by his interviewer that as the police understood it, the law did not give Sinclair the right to further legal assistance in the circumstances. In time, he confessed to the killing. Furthermore, he participated in a re-enactment of the killing, and then revealed again, to an undercover officer who had been planted in his cell, that he had carried out the killing. At trial, the admissibility of the confessions and the re-enactment was challenged, unsuccessfully, by the defence. The Court of Appeal for British Columbia dismissed an appeal, as did the Supreme Court.

The “restrictive position”: initial access and access in change of circumstances

The majority position was set out in reasons given by the Chief Justice (McClachlin C.J.), and Charron J. Another three justices (Deschamps, Rothstein, Cromwell JJ.) concurred. The “restrictive position” is that section 10(b) obliges the police to inform the suspect of his right of consultation at the time of detention or shortly thereafter and to allow him that right in practice, and that it requires the police to afford the suspect a further opportunity to consult with counsel where a “change of circumstances” makes this necessary ([53]). Those circumstances must be objectively observable at the time of interview, and not merely asserted when legal arguments as to admissibility arise ([55]).

There are three broad categories of case, which are not closed ([54]), in which it is recognised that the right to further consultation arises. The first is where the suspect is asked to, or required to, participate in a non-routine procedure such as a line-up or a polygraph test, which counsel will not (or may not) have anticipated when giving initial advice ([50]). The second category is “change in jeopardy”, where the accused faces new and more serious allegations which were not disclosed to him before his initial consultation ([51]). The final category is where the police become aware that the detainee may not have understood his right to silence, or where the police themselves undermine the legal advice the detainee has received ([52]).

The majority view of the ambit of the section 10(b) right was based on their position that the purpose of that right is merely to support the detainee's right, under section 7 of the Charter, to choose whether or not to co-operate with the police investigation ([47]). Thus, as long as it appears to the police that the detainee knows that he has the right to remain silent, no further communication with counsel is required.

The “intermediate position”: initial access and access as the case unfolds

Similarly to the majority, Binnie J. recognised that the section 10(b) right is triggered upon initial arrest or detention, and that it is triggered again by some form of change of circumstance in the interview room. The difference between the majority's “restrictive” and Binnie J.'s “intermediate” positions is as to what constitutes a change of circumstance sufficient to trigger the right. For Binnie J., ordinary developments during the course of an interview, such as the presentation or assertion of the existence of new evidence, are sufficient. This is because, rather than looking to enumerate an objective set of categories to determine whether there has been a change of circumstances, Binnie J. was concerned with what effect developments in the interview room have on the defendant. Thus, on the facts of *Sinclair*, Binnie J. found that the revelation by the police of new information to the accused, some of it true and some false, and the description by the police of the case against him as “overwhelming”, meant that Sinclair had a renewed right to consult counsel ([83]): “the appellant was clearly concerned (manifested by his five separate requests to contact his lawyer again) whether the lawyer's initial advice (whatever it was) remained valid.”

Binnie J. arrived at a less restrictive position than the majority because he conceived the purpose of the right to counsel as being wider than enforcing the right to silence. He accepted the submission of the Ontario Criminal Lawyers' Association that if the purpose of defence counsel was purely to ensure that an accused was aware of his right to silence, that task could be accomplished by a recorded message: “You have reached counsel; keep your mouth shut; press one to repeat this message” ([86]). In fact, if the role of defence counsel at the interview stage were restricted to reminding the defendant of his right to remain silent, the result could be the giving of “terrible advice”. Binnie J. gives the example of a defendant who, when being interrogated about the date and time of an offence, fails to disclose a genuine alibi, because he is blindly following the advice to keep quiet. It is submitted that this reasoning applies equally to any situation where the defendant fails to disclose the existence of a legitimate defence.

Under the “intermediate position”, the actual purpose of the right to counsel is to render meaningful legal assistance to the accused as the case against him unfolds. However, it is expressly stated that the right to consult counsel is not unfettered: it is only available for the purpose of giving legal assistance, and not simply to delay or distract from the interrogation. The accused does not have a unilateral power to bring a halt to the interrogation ([112]).

The “expansive position”: access throughout

At the other end of the scale to the majority, were the dissenting reasons given by LeBel and Fish JJ. (with whom Abella J. concurred) (the “expansive” position). Their reasons fail to disclose any coherent test for when the accused will have a right to access counsel, but it appears that the right is unfettered. For LeBel and Fish JJ., the right to instruct and retain counsel exists not merely as a corollary to the right to silence, but as a constitutional principle in its own right, and also as a manifestation of the presumption of innocence and the privilege against self-incrimination ([128], [156]). As the police have no corresponding right to force the accused to speak to them, any custodial interrogation must be subject to the right of the suspect to consult counsel at any time ([129]). While recognising that Binnie J.’s position would expand the ambit of section 10(b), LeBel and Fish JJ. were unable to accept that, under Binnie J.’s proposals, it would still be ultimately up to the police to decide whether the defendant requires meaningful legal assistance to deal with the case unfolding against him.

Reasons for the divergence of approaches

In addition to disagreeing over the purpose of the right to retain and instruct counsel, members of the court displayed widely differing feelings as to the effect of interrogation in custody upon detainees. The majority concentrated little on this, beyond asserting that the public interest required custodial interrogations to take place. Binnie J., however, noted that there has been a host of known miscarriages of justice in Canada, and that “innocent people are induced to make false confessions more frequently than those unacquainted with the phenomenon might expect” ([90]). His reasons describe interviews in custody as an “endurance contest” ([92]). Similarly, the minority describe interrogating officers as undertaking “relentless and skilful efforts to obtain a confession”. It is submitted that the facts of the three cases before the court, in which the detainees were questioned for hours and denied access to counsel, themselves demonstrate the accuracy of the dissentients’ views of police interrogations.

The members of the court were split as to their assessments of the practicalities of expanding a detainee's right to access counsel. The majority state that Binnie J.'s position would usher in a test that "is so vague that it is impractical" ([59]), and which would leave in its wake a trail of Charter motions, appeals and second trials. Binnie J. accepted this argument head on, thereby demonstrating its weakness: "The criminal justice system might well work most smoothly and efficiently from the crime-stopper's perspective if we had no Charter.... . If it takes time to work out its proper amplitude, so be it." ([107]). The court also disagreed over the practical effect, at the police station, of recognising a wider right of access to counsel. On the face of it, none of the justices advocated the adoption of the American system under which, since *Miranda v. Arizona*, 348 U.S. 436 (1966), detainees can insist on the presence of lawyers in interrogations. However, the proponents of the "expansive view" drew attention to the fact that the frequency of confessions has not been significantly affected by the 1966 decision, while the majority relied on the fact that *Miranda* may have had a detrimental effect on law enforcement, and also that most suspects waive their *Miranda* rights (though this fact, by suggesting that the costs of a *Miranda* regime would not be excessive, could easily be used to argue in favour of the adoption of a *Miranda* regime).

Comment

It is submitted that since the right to instruct counsel exists to protect the defendant, whether in order to buttress his right to silence or to safeguard his wider constitutional rights, it is the effect of an interrogation on the defendant that must form the starting position when deciding when the right is available. Binnie J.'s position stands alone in approaching the availability of the right from this point of view. The categories of "change of circumstances" proposed by the majority fail to reflect the fact that actions of the police that do not specifically fit into such a category can have a much greater impact on the will of the detainee than actions that do. At the other end of the spectrum, the unfettered right of access seemingly adopted by the "expansive position" minority could not be appropriately recognised judicially. It would require wide consideration of policy and economics, which is more appropriately undertaken by Parliament rather than the courts. Binnie J.'s position is thus the most coherent and practical. However, being the only position that was unsupported by any other member of the court, it is unlikely to become law in the near future.

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Longer articles, which examine some general common law principle, or undertake a comparison of various authorities' approaches to a particular question of law, should be between 10,000 and 12,000 words in length (including footnotes), and shorter articles, which examine a particular approach to a problem shared by different common law jurisdictions, or undertake a simple comparison of two jurisdictions' approaches to such a question, should be between 5,000 and 6,000 words. An abstract of no more than 150 words, clearly summarising the arguments, should be submitted with the article. The preferred length for case comments is 2,000 to 4,000 words.

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